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United States, French and Italian Air Pollution Control: Central and Local Relations as a Structural Determinant of Policy

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United States, French and Italian Air Pollution Control: Central and Local Relations as a Structural Determinant of Policy

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I. INTRODUCTION

Questions about the appropriate degree and nature of local autonomy and of administrative decentralization arise in responding to many kinds of environmental problems. This comparative study will investigate these questions in the context of United States, French, and Italian air pollution control efforts. European Economic Community[1] air pollution law will also be considered in order to present a complete picture of air pollution law in France and Italy, which are Community member states. The implications of air pollution's wide ranging geographic impact and the mobility of economic activity in the face of localized air pollution control efforts will receive particular attention.

This comparative investigation is not concerned with what country has the cleanest air or the "best" air pollution control program. Any such judgment would require subjective assessments, such as the priority of air pollution relative to other social concerns, and technical

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1. The European Economic Community is composed of Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom, all of which have adhered to the Treaty of Rome, as amended.

evaluations, such as the effect of geography and climate on air quality or the character of national economic activity and its effect on air pollution emissions.

This investigation is concerned with how the structure of decisionmaking, specifically the distribution of responsibilities between central and local levels of government, affects the substance of air pollution control. Although the varying distribution of responsibilities between local and central authorities in each of the systems studied permits comparative hypotheses to be tested, unfortunately for purposes of investigation, each system relies primarily on command and control regulation[2] rather than on economic incentive strategies.[3] Under an economic incentive approach the amount of allowable pollution would be determined by issuing a fixed quantity of tradable pollution permits or by fixing a pollution charge sufficient to induce the desired level of pollution abatement. In addition to its promotion of economic efficiency by inducing realization of the lowest cost abatements, its promoters further argue that it explicitly focuses attention on the total amount of pollution to be allowed, a variable overlooked in technology based permitting schemes typical of command and control regulation.[4]

This is an example of how different pollution control strategies may lead to different substantive results by changing the kinds of questions presented for decision. Although the United States, France, and Italy have not yet employed economic incentive approaches in air pollution control to any significant degree, the analysis which follows does show how the distribution of responsibilities between central and local levels of government may affect the substance of air pollution control efforts. The illustration of the importance of the decision structure is likely to interest those who would advocate fine tuning of the existing command and control regulation as well as to those who would replace it by an economic incentive approach.

The focus on the distribution of power and responsibilities between central and local units of government limits the investigation in yet another way. It necessarily overlooks the importance of basic political and cultural differences as factors in understanding a particu-

2. Command and control regulation refers to express governmental determination of permissible conduct by means of permits, licenses, concessions, and the like.

3. Economic incentive strategies are advocated by Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

4. *Id.*

lar country's air pollution control efforts. Many examples of these differences exist.

For example, in the United States two political parties alternate in power. In Italy, where coalition governments of essentially the same four or five parties are the rule, many ministries remain consistently in the hands of particular parties.[5] Consequently, reorganizing the public bureaucracy in Italy is harder than in the United States because of the greater stake of the political parties in the status quo.[6]

Finer differences also distinguish the systems. For example, in the civil law tradition of continental Europe, bureaucrats are much more likely to have a legal background than in the common law tradition of the United States.[7] Even between France and Italy there are important differences of administrative culture. France, for example, has the tradition of elite administrative corps and a passive judiciary,[8] while Italy has an activist career judiciary and no tradition of *grand corps*.[9]

Focusing on the distribution of responsibilities between central and local governmental levels to the exclusion of other issues may diminish the accuracy of the comparative observations to be made. However, the narrowness of focus is necessary to draw policy conclusions which would otherwise be lost among the many national idiosyncrasies.

II. STRUCTURAL CONCERNS

Local and central levels of government may perceive air pollution problems in different ways.[10] The physical impact of pollution, the economic costs and benefits of control, the administrative burden

5. For contemporary analysis of Italian political parties and patronage, see E. Scalfari, *Riflessioni sul voto del 12 maggio*, LA REPUBBLICA, May 19-20, 1985, at 1.

6. *Cf.* B. DENTE, GOVERNARE LA FRAMMENTAZIONE: STATO, REGIONI ED ENTI LOCALI IN ITALIA 104 (1985).

7. J. ABERBACH, R. PUTNAM, & B. ROCKMAN, BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES 51 (1981).

8. *See infra* text accompanying notes 136-151.

9. Del Duca, *Il giudice italiano e statunitense: il contrasto tra strategie in sostituzione e strategie di controllo della Pubblica Amministrazione*, UNITA DELLA GIURISDIZIONE E TUTELA DELL'AMBIENTE 374 (1986).

10. *See generally* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) (reviewing issues relevant to central and local responsibilities). What Professor Stewart calls spillover problems include political externality effects.

of control, and the value of clean air are among the factors which may be assessed differently.

At a basic physical level, air pollution produced in one locality, as in the case of photochemical smog and acid rain,[11] may have its principal effects elsewhere. Any one locality may make only a marginal contribution to the global problem. Therefore, localities may find little interest in individually instituting control measures to abate such air pollution. Alternatively, severe and visible local problems, such as Los Angeles' photochemical smog or Turin's traditional mix of winter smoke and fog, may induce local authorities to take action which central authorities would not.

Central and local levels of government will also be influenced differently by the ability of pollution sources to relocate. To the extent that the increased costs of pollution control may induce polluters to relocate to areas without control, local authorities face substantially larger costs to pollution control. The implicit threat that existing activity and future growth may locate in other areas is a disincentive to local control efforts.[12] Of course, a central government may be subject to some economic pressures to which a local government is immune. It may be that a nationalized utility or a major private corporation could exert pressures more successfully at the central level than on some local governments.

A polluter's lack of need to consider the effects of pollution as a production cost is the classic example of an economic externality.[13] It will be convenient to refer collectively to the exportation of pollution, the slight marginal impact of pollution from any one locality, and the pressure of industrial relocation for the least common denominator solution as political externality effects. In each case the external impact of pollution damage, the external incidence of the benefits of control, or the export of economic benefits linked to pollution in the face

11. *See* R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY, 1982 SUPP. 96-98 (Supp. 1982); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL POLICIES FOR THE 1980'S 29-34 (1980); Wetstone & Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89 (1984); Wetstone, *Acid Rain: The International Perspective*, 11 ENVTL. POL'Y & L. 31, 31-33 (1983); ENVIRONMENTAL RESOURCES, LTD., ACID RAIN: A REVIEW OF THE PHENOMENON IN THE EEC AND EUROPE (1983); *Photochemical Smog* in CONTRIBUTION OF VOLATILE ORGANIC COMPOUNDS (OECD, 1982).

12. *See* M. CRENSON, THE UNPOLITICS OF AIR POLLUTION: A STUDY OF NONDECISIONMAKING IN THE CITIES 76-82 (1971).

13. For a thoughtful exposition of how conventional economic analysis applies to environmental problems, see D. PIERCE, ENVIRONMENTAL ECONOMICS (1976).

of isolated control efforts is a powerful incentive for local inertia. As long as decision-making power remains exclusively local, the full benefits of pollution control will tend to remain external to local decision makers' analysis, hence the term "political externality."

In addition to these considerations of political externality, administrative economies and diseconomies of scale also play a role in the appropriate distribution of central and local responsibilities.[14] Various kinds of knowledge may be critical to pollution control efforts. Common to all kinds of pollution control is an understanding of the nature and sources of pollution emissions and of their effects on health and the environment. The substantial economies of scale in research on these issues argue for a centralized role in gathering and disseminating information and in setting standards. However, other kinds of information may not so readily suggest centralization. For example, the awarding of permits to individual industrial pollution sources may require evaluation of local and facility specific factors. Centralization of these functions may impose substantial bureaucratic costs.

It is difficult to generalize about issues such as these because not only is it difficult to calculate costs in the abstract, but also because in different circumstances varying combinations of market regulatory and of command and control strategies may be desired. Although both kinds of strategy require a basic understanding of pollution, its effects and its sources, the kinds of information each requires about individual polluters will vary, and accordingly may alter the economies and diseconomies of scale in information gathering and dissemination.

The choice of pollution control strategy and the distribution of pollution control responsibilities among levels of government may also affect the kinds of explicit political choices to be made with regard to pollution control. For example, one approach might be to centrally establish ambient safety standards and then implement them by a permitting system. Such an approach may overlook the possibilities for cost effective reductions in pollution which could be achieved by focusing control efforts on inexpensively abated pollution and on pollution to which large populations are exposed. By the same token, an approach under which the permitted quantity of emissions was centrally determined and then achieved by instituting a pollution tax

14. *See supra* note 10; *see also* Coase, *The Problem of Social Cost*, 3 J. OF L. & ECON. 1 (1960); Zerbe, *The Problem of Social Cost in Retrospect*, 2 RES. L. & ECON. 83, 84 (1980).

would possibly allow some populations to be exposed to unhealthful quantities of pollutants.

The tension between equal protection and cost effective pollution control illustrates the significance of the level of government at which pollution control decisions are made. The problem can be simply stated. If air quality were equal everywhere, improving air quality in a city would yield greater benefits in terms of collective exposure than would improving air quality in a less populated rural area.[15] But, it might be asked, does not everyone have the same right to healthy air?[16]

Resolution of this conundrum is not a technical problem. Rather, it is exquisitely political.[17] On one hand, moving responsibility to the most local level possible may permit the kinds of debate, reciprocal persuasion, and compromise which tend to legitimize collective decisions of conflicts between individual rights and collective interests. On the other hand, local decision-making may disregard impacts of locally generated pollution outside the local area or attach excessive weight to economic consequences of pollution control.

As expressed in United States political theories, the ideal is that political units be:

> (1) large enough to encompass a heterogeneous mixture of people and problems so as to avoid the tyranny of the majority (Madison's

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15. Harrison & Nichols, *Benefit-Based Flexibility in Environmental Regulation*, HARVARD ENERGY AND ENVIRONMENTAL POLICY CENTER, DISCUSSION PAPER SERIES E-83-06 (Apr. 1983), make the case for varying regional air pollution standards. *See also* Haigh, Harrison, & Nichols, *Benefit-cost Analysis of Environmental Regulation: Case Studies of Hazardous Air Pollutants*, 8 HARV. ENVTL. L. REV. 395, 433 (1984) (case study of three toxic air pollutants).

16. *See* Kelman, *Cost-Benefit Analysis and Environmental, Safety, and Health Regulations: Ethical and Philosophical Considerations*, in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS: POLITICS, ETHICS AND METHODS 137-54 (D. Swartzman, R. Liroff, & K. Croke, eds. 1982).

Judge (now Justice) Corasaniti writes:

Nessun organo di collettivita, neppure di quella generale e del resto neppure l'intera collettivita generale con unanimita di voti potrebbe validamente disporre per qualsiasi motivo di pubblico interesse della vita o della salute di un uomo, o di un gruppo minore. (No collective body, even of the general collective, nor even the entire collectivity by unanimous vote, could for any reason of public interest dispose of the life or health of a person or of a lesser group.) (unless otherwise noted, all translations are by the author)

Judgment of Oct. 6, 1979, Corte Cass., Italy, 102 Foro Italiano [Foro It. I] 2302, 2306 (1979).

To keep the argument sharp, questions relative to esthetic values or the value of preserving the environment in its natural state are not considered.

17. *See* O'Hare, *The Country Mouse and the City Mouse*, 4 J. POL. ANALYSIS & MGMT 556, 556-59 (1983).

> defense of the American Republic against Montesquieu's criticism of large republics is based on this principle) and (2) small enough to ensure that most of the problems [are] of concern to most people.[18]

The degree to which American states, French departments or regions, or Italian regions fit this description is unclear, and it is accordingly difficult to speak in absolute terms about the ideal level of government responsibility. Concerns of equal protection, administrative efficiency and political externality may pull in conflicting directions. The analysis of the United States, France, and Italy will argue that these varying concerns are best accommodated when central and local responsibilities are divided so as to permit local and central governments to compete with each other.

The value of local autonomy and the diseconomies of scale in central regulation of numerous dissimilar sources of pollution suggest that localities (departments, regions or states) should have primary responsibility for control of air pollution arising from their territory. However, the political externalities associated with air pollution control argue that local discretion should be limited by centrally determined minimum standards, and central authorities ought to be capable of impelling local action.

This article argues that central action is necessary to overcome the local inertia likely to exist as a result of the political externalities associated with air pollution control. Nevertheless, to the extent feasible, localities should bear administrative responsibility for implementing any central air pollution control policies, and they should have the political autonomy to decide the best method to accomplish such implementation. This arrangement will lessen the imposition on local autonomy and the administrative diseconomies associated with centralization. Moreover, notwithstanding the need for a strong central role to overcome local inertia, it is important that centrally imposed standards be only minimum standards, allowing localities to exercise some discretion and autonomy.

Local pollution problems sometimes lead local governments to act when central authorities do not. Examples include Turin's regulation of space heating[19] and California's imposition of vehicle emission

18. E. HAEFELE, REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT 86-87 (1973).

19. Faced with inadequate national controls, Torino, a city of about 1.2 million, issued a municipal ordinance to control air pollution caused by space heating. *See* B. DENTE, P. KNOEPFEL, R. LEWANSKI, S. MANNOZZI & S. TOZZI, IL CONTROLLO DELL'INQUINAMENTO

controls.[20] These local actions may trigger general central action. For example, in the case of California's emission controls, concerns about the burden of state regulations relating to interstate commerce differing from state to state contributed to provoking federal regulation.[21] Also, although central authorities are usually able to resist pressure from sources of pollution lobbying for less stringent standards, local authorities may sometimes be able to insist more effectively on stricter standards. For example, as previously noted, a locality may well be capable of imposing stricter standards on a nationalized electric utility than central authorities.

The review of the regulatory schemes of the United States, France, and Italy which follows is intended to show the need for balance in allocating central and local responsibilities. Balance does not, however, mean weakness or passivity at either level. This article argues that competition between local and central levels together with a strong central power to effectively mandate minimum (not minimal) levels of local action will produce the best results for air pollution control.

III. UNITED STATES

A. Federal Intervention Conditioned State Action

1. A brief history

United States cities have long attempted to control air pollution.[22] For example, Chicago adopted a smoke ordinance in 1881.[23] Efforts such as this were inadequate because municipalities could not bring sufficient resources to bear on the problem.[24] The states were

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ATMOSFERICO IN ITALIA: ANALISI DI UNA POLITICA REGOLATIVA (1984) [hereinafter B. DENTE & P. KNOEPFEL].

20. 42 U.S.C. § 7543 permits California to do so as long as the state standards meet certain minimum requirements. Section 7543(a) sets forth a general prohibition against States (or their political subdivisions) adopting or enforcing an emissions control standard in conflict with the federal standards. However, section 7543(b) then provides that the prohibition will be waived as to those states which first adopted standards before March 30, 1966 and when those states' standards are, *inter alia*, at least as stringent as the federal standards.

21. J. KRIER & E. URSIN, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940-1975 169-76 (1977).

22. D. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS 1-9 (1981).

23. CHICAGO, ILL., LAWS AND ORDINANCES, p. V, art. XXVII, § 1451(2016), and art. XXIX, § 1650-2(2253-5) (1890), *cited in* D. CURRIE, *supra* note 22, at 1-8.

24. *See, e.g.*, Currie, *Enforcement Under the Illinois Pollution Law*, 70 NW. U.L. R. 389 (1975).

slow to follow because air pollution was seen as a strictly local problem. For example, Illinois did not create a state air pollution control agency until 1963.[25]

In 1955 Congress enacted the first federal legislation on air pollution[26] which provided for federal research grants and information dissemination. More expansive and drawing on local resources, the Clean Air Act of 1963[27] provided federal grants for state enforcement,[28] permitted interstate compacts[29] (although none were ever established), and created an extremely cumbersome enforcement procedure known as an abatement conference.[30] In an abatement conference, state, local, and federal officials were to confer with polluters to reach a settlement.[31] The only incentive for agreement under this provision was the remote possibility of a federal law suit.[32] Only eleven such conferences were held.[33]

Subsequent legislation continued to be procedurally unworkable or insufficiently stringent. The Motor Vehicle Air Pollution Control Act of 1965 authorized national standards for cars.[34] The Air Quality Act of 1967[35] provided for establishment of federal air quality criteria to be adopted by the states.[36] The 1967 Act permitted a federal enforcement suit after violation of air quality standards for 180 days and if a Governor requested the suit or if there was an interstate effect. Neither state nor federal authorities took much action under these awkward procedures.[37]

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25. Ill. Air Pollution Control Act, 1963 Ill. Laws 3191 (repealed 1976).

26. Act of July 14, 1955, Pub. L. No. 159, 69 Stat. 322. For a chronicle of United States federal air pollution control legislation from 1955 to 1974, see J. DAVIES & B. DAVIES, THE POLITICS OF POLLUTION 44-57 (2d ed. 1975).

27. Pub. L. No. 88-206, 77 Stat. 392 (1963).

28. *Id.* § 4.

29. *Id.* § 2.

30. *Id.* § 5.

31. *Id.*

32. *Id.* § 5(f).

33. J. DAVIES & B. DAVIES, *supra* note 26 at 57.

34. Pub. L. No. 89-272, § 202, 79 Stat. 992, 992-93 (1965) (codified as amended at 42 U.S.C. § 7521 (1982)). Section 202 provided for administrative promulgation of national standards.

35. Pub L. No. 90-148, 81 Stat. 485 (1967) (codified as amended at 42 U.S.C. §§ 7401-28 (1982 & Supp. III 1985)).

36. Pub. L. No. 90-148, § 107, 81 Stat. 485, 490-91 (1967) (codified as amended at 42 U.S.C. §§ 7408-10 (1982)).

37. *See generally* D. CURRIE, *supra* note 22, §§ 1-9 - 1-21.

Only with the Clean Air Act Amendments of 1970[38] was a serious commitment made to action at the federal level. That Act, also for the first time, gave the federal government the means to compel significant state action.[39]

2. Wisconsin: a case study

Legislation in the state of Wisconsin illustrates how control efforts evolved as air pollution became more widespread and complex.[40] The increasingly apparent inadequacy of local efforts was not rectified until the federal government intervened to require the establishment of significant state level bureaucracy to address the issue. Federal intervention was provoked by increasing public awareness of air pollution, which in turn was partly due to prior local efforts to resolve the problem.[41]

Milwaukee, Wisconsin's major city, has been the state's leader in air pollution control. As early as 1846 a municipal ordinance permitted city officials to remove hazards to the inhabitants' health and convenience.[42] From the late 1800's through the 1920's city efforts focused on fines for emissions of dense black smoke.[43] From 1926 to 1946, various city agencies, which primarily regulated building safety, were responsible for air pollution control.[44]

Until the late forties, air pollution was perceived as a problem of visible particulate emissions from smokestacks. Indeed, a 1909 state legislature resolution requested the city council of the state capital to abate "the soft-coal nuisance" which was dirtying the new, white marble capitol.[45] In the beginning this emphasis on local esthetic effects may have been realistic, however, as urbanization and industrialization increased, effective regulatory action required a more sophisticated understanding of air pollution.

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38. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-642 (1982 & Supp. III 1985)).

39. *See infra* text accompanying notes 58-83.

40. J. LAITOS, A LEGAL-ECONOMIC HISTORY OF AIR POLLUTION CONTROLS (1980).

41. *Id.* at 307-10.

42. *Id.* at 69.

43. *Id.* at 75-81.

44. *Id.* at 92-103.

45. The resolution provided in relevant part: "Whereas the beauty of the edifice must be seriously impaired soon by the condition of the atmosphere which has become immeasurably worse . . . the legislature requests and expects the common council of Madison to effect an abatement of the soft-coal nuisance in this city." 1909 WIS. LAWS, *reprinted in* J. LAITOS, *supra* note 40, at 119.

State courts began to decide nuisance actions against polluters after World War II.[46] However, such individual litigation could not effectively manage air pollution. The suits involved too few of the actual polluters. Furthermore, proof by private parties was difficult, and bringing suit expensive. Judicial interventions were isolated events lacking any systematic coherence, and the judges did not have adequate technical expertise.

From 1947 to 1973, state law delegated the responsibility for air pollution control to the County of Milwaukee.[47] The County instituted a permitting program and regulated fuel quality.[48] Although the County's effort was constructive, it did not go much beyond regulating particulate emissions. The County did not have sufficient bureaucratic resources to explore its pollution problem more deeply.

The State Board of Health had nominal responsibility for air pollution beginning in 1937, but never acted.[49] According to a thirty year veteran of the Board, its officials thought air pollution was solely a smoke problem suited for local control.[50]

Federal legislation in 1967 provided for federal regulation of air pollution control in the absence of state action.[51] In response Wisconsin passed its own Clean Air Act[52] administered by the new Department of Natural Resources.[53] The air pollution branch was staffed by only two people until 1970.[54] In 1970 the federal Environmental Protection Agency (EPA) was created,[55] and the Clean Air Act Amendments of 1970 required EPA approval of state air pollution control plans.[56] The state then prepared a comprehensive plan consistent with federal guidelines, which the EPA subsequently approved.[57]

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46. J. Laitos, *The Social and Economic Roots of Judge-Made Air Pollution Policy in Wisconsin*, 58 MARQ. L. REV. 465, 479 (1974-1975).

47. LAITOS, *supra* note 40, at 168-214.

48. *Id.*

49. *Id.* at 276.

50. *Id.* at 276-77.

51. Clean Air Amendments of 1967, Pub. L. No. 90-148, § 108, 81 Stat. 485, 491-97.

52. Clean Air Act, 1967 Wis. Laws 83. As subsequently amended, Wisconsin air pollution law is codified at WIS. STAT. § 144.30-.32 (1981).

53. Created in 1967, by WIS. STAT. § 15.34 (1981). *See* J. LAITOS, *supra* note 40, at 307.

54. J. LAITOS, *supra* note 40, at 327.

55. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), as amended by Pub. L. No. 98-80, § 2(a)(2), (b)(2), (c)(2)(C) (1983), *reprinted in* 42 U.S.C. app. at 502 (1983), 42 U.S.C. app. at 1102 (Supp. III 1985), 84 Stat. 2086 (1970), *and in* 97 Stat. 485, 486 (1985). *See also* J. DAVIES & B. DAVIES, *supra* note 26, at 107-14.

56. 42 U.S.C. § 7410 (1982).

57. The Wisconsin plan, officially submitted on January 14, 1972, was initially approved

The lack of understanding of air pollution was certainly one factor behind the inadequacy of local efforts in Wisconsin. The lopsided balance of diffuse benefits of air pollution control as against very discrete incidence of control costs diminished local political initiative to raise the issue of air pollution. Also, as a single state, Wisconsin had substantial disincentive to act in isolation for fear of directing economic activity to other states. Nonetheless, efforts like Wisconsin's played a role in pushing the air pollution problem into the public consciousness and in creating the consensus on which federal legislation depended.

B. Contemporary Federal Controls

The introductory sections of the Clean Air Act currently in force,[58] recognize the need for central leadership by providing that "prevention and control of air pollution at its source is the primary responsibility of States and local governments; and . . . Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."[59] Consistent with these introductory passages, states have the primary responsibility for awarding permits to air pollution sources within federally established constraints.

Pursuant to the Clean Air Act, United States central bureaucracy makes three kinds of decisions which local decision makers cannot adequately handle. First, it sets New Source Performance Standards. Second, central bureaucracy sets ambient air quality standards. Third, it monitors compliance with them through its power to review and disapprove State Implementation Plans.[60]

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by the EPA on May 31, 1972, 37 Fed. Reg. 10842, 10902-10903. Additional parts were approved on September 10, 1974, 39 Fed. Reg. 32606.

58. 42 U.S.C. § 7401-62 (1982 & Supp. III 1985). For a comprehensive treatise on the Clean Air Act, see D. CURRIE, *supra* note 22. After analyzing the many problems with the Act, Currie concludes that it "is extremely untidy, but it works." *Id.* at § 10-5. For discussion of some reforms to simplify the permitting process, see Del Duca, *The Clean Air Act: A Realistic Assessment of Cost-Effectiveness*, 5 HARV. ENVTL. L. REV. 184 (1981). On the Reagan administration's environmental policy, see Peterson (former head of the Council on Environmental Quality under Presidents Nixon and Ford), *Laissez-Faire Landscape*, NEW YORK TIMES MAGAZINE, Oct. 31, 1982 at 27.

59. 42 U.S.C. § 7401(a)(3), (4).

60. There are further constraints imposed on states' freedom of choice. Their implementation plans must respect the prevention of deterioration and nonattainment provisions of the Act. Congress provided for zoning and then specified the allowable deterioration in each of the three kinds of zones for two pollutants. *Id.* § 7491. Eventually deterioration criteria are to be specified by the EPA for all pollutants for which there exist ambient air quality standards.

1. New source performance standards

New Source Performance Standards (NSPS) are uniform national emission standards for new sources of air pollution.[61] Central regulation of pollution from new industrial sources is important for two reasons. First, new industrial facilities are more likely to move to areas with less stringent controls in the face of isolated attempts at regulation. Second, central regulation provides economies of scale in determining what controls might be demanded of new industrial facilities. The federal standards are applied by states on an individualized basis, thus allowing for local review and appreciation of factors such as siting.

2. Air quality standards

The Clean Air Act requires the EPA to establish uniform air quality standards for hazardous pollutants arising from numerous sources.[62] Although United States ambient air quality standards are asserted to be based on neutral scientific criteria indicating safe threshold values,[63] it is generally conceded in the United States that available evidence is insufficient to avoid the need to make subjective assessments of risk. Indeed, the standards are the result of a cost benefit analysis which values health benefits highly, something which a local decision maker would not be readily able to do given its greater sensitivity to local and short term concerns.

In addition to the political externality ground, there are other reasons justifying centralized setting of air quality standards. To the extent that setting ambient air quality standards requires gathering and evaluating general technical information, another reason for the

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Non-deterioration of visibility is a special concern in areas classified by the Act as not to be subject to lessening of air quality. *Id.* If an area has not attained air quality standards, the state plan must require especially stringent conditions in the permits issued under it. *Id.* §§ 7501-08. For prevention of deterioration, visibility protection, and nonattainment, the EPA is to issue regulations which are to be incorporated in state plans.

The Act imposes uniform standards on new vehicles, but concedes to the EPA the authority to grant postponements, *Id.* § 7521, and the authority to permit qualified states (*e.g.*, California) to require stricter standards. *Id.* § 7543. The EPA may permit other states not meeting air quality standards to adopt the California standards. *Id.* § 7507.

61. *Id.* § 7411.

62. *Id.* §§ 7408-09. Two kinds of standards are to be established. Primary standards protect human health. Secondary standards, whose attainment is less urgent, protect general welfare. Standards were initially established for sulfur dioxide, nitrogen oxides, total suspended particulates, ozone, carbon monoxide, and hydrocarbons. Lead was later added. *See* Del Duca, *supra* note 58, at 187.

63. 42 U.S.C. § 7409(b) (1982).

central formulation of these standards is the administrative economy of scale. That states have not, with the exception of such notable cases as California,[64] attempted to confront their air pollution problems merely on their own initiative suggests the need for the present federal role in standard setting, notwithstanding the arguments for local autonomy. Increased scientific understanding and greater public awareness of air pollution may be changing this circumstance.

3. State implementation plans

The states are responsible for developing plans (State Implementation Plans or SIPs) to meet EPA air quality standards.[65] States have free choice of how to meet the standards subject to the constraint that the EPA approve the plan.[66] The EPA's power to approve the plans and to substitute its own plan when a state does not produce a satisfactory plan is essential to achieve ambient air quality standards.[67]

Nonetheless, the states actually decide the details of which, and to what extent, sources are subject to controls. Additionally, the states' more extensive bureaucratic resources are better able to determine case by case the controls to be applied in each permit issued under the SIP and to monitor compliance. A state also may impose stricter controls than required under its federally approved SIP if it so desires.[68] The margin of discretion left to the state bureaucracies in implementing the standards is appropriately subject to local democratic direction by state legislative control over budgets and administrative organization and by state executive and legislative control of the selection of administrative managers.

a. EPA pushed states

The case of Pennsylvania illustrates the importance of EPA ap-

64. For California's extensive regulation of air control, see CAL. HEALTH & SAFETY CODE §§ 39000-44384 (Deering 1986 & Supp. 1988).

65. 42 U.S.C. § 7410 (1982).

66. For a study illustrating the economic and environmental difficulties which must be confronted in developing a SIP, see *Ohio River Basin Energy Study (ORBES)*, National Technical Information Service (EPA), no. PB 81-161788 (1981).

67. For example, the United States has prosecuted utilities for exceeding sulfur dioxide emission limits under the Pennsylvania SIP in United States v. West Penn Power, 460 F. Supp. 1305 (W.D. Pa. 1978), cited by L. WENNER, THE ENVIRONMENTAL DECADE IN COURT (1982).

68. *See, e.g.*, Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975).

proval of state implementation plans.[69]

A 1960 Pennsylvania law created an air pollution commission with five state government representatives and six public representatives, which set standards and issued air pollution abatement orders.[70] Technical qualifications demanded of the public representatives were such that industry representatives dominated the board.[71] In 1970 Pennsylvania created the Department of Environmental Resources, with comprehensive permitting, planning, and enforcement authority.[72]

At no time during the ten years from when Pennsylvania first became active in air pollution control until the federal Clean Air Act of 1970 were adequate technical and administrative resources devoted to the task of air pollution control. In fact, a major issue in EPA approval of Pennsylvania's SIP was the number of state personnel to be employed in administering the plan. In 1973 the state employed approximately 115 to 120 people in air pollution control.[73] To approve the plan, the EPA required increasing employment to 305 people.[74]

b. Transportation control plans

The importance of the EPA's power of intervention is further illustrated by the controversy over transportation control plans.[75] The Clean Air Act of 1970 allowed the EPA to require provision for periodic inspection and testing of motor vehicles to be included in State Implementation Plans as a condition of their approval.[76] The EPA's first attempt to require states to adopt such plans was unsuccessful. These plans would have required not only inspection and maintenance of cars, but also would have limited the use of cars in major cities. Following inconclusive and conflicting results in litigation concerning the EPA's statutory and constitutional authority to

69. State implementation plan provisions appear in 42 U.S.C. § 7410 (1982 & Supp. III 1985).

70. C. JONES, CLEAN AIR: THE POLICIES AND POLITICS OF POLLUTION CONTROL 50-52 (1975).

71. *Id.* at 50.

72. PA. STAT. ANN. tit. 71, § 510-1(23) (Purdon Supp. 1987); PA. STAT. ANN. tit. 35 § 4004 (Purdon Supp. 1987); *see* C. JONES, *supra* note 70, at 232.

73. C. JONES, *supra* note 70, at 237.

74. *Id.*

75. *See* Ostrov, *Inspection and Maintenance of Automotive Pollution Controls: A Decade-Long Struggle Among Congress, EPA and the States*, 8 HARV. ENVTL. L. REV. 139 (1984).

76. 42 U.S.C. § 7410(a)(2)(G) (1982).

impose the controls,[77] the political furor led to abandonment of the attempt in its extreme form.

Congress responded in 1979 by giving the EPA additional power to require imposition of such controls as part of efforts to meet ambient air quality standards. First, for areas that would not meet ambient air quality limits within statutory deadlines, a construction moratorium on new sources of air pollution was imposed.[78] Second, for areas without adequate plans the EPA was authorized to disapprove Clean Air Act projects and grants, and the Department of Transportation was authorized not to approve highway projects and grants.[79] Third, the EPA was authorized to withhold sewage treatment grants from noncomplying states.[80]

When the EPA again attempted to require vehicle inspection and maintenance programs as part of SIPs, it met with greater success. At least fourteen states now have functioning programs.[81] In California and Pennsylvania the EPA had to invoke the moratorium and funding cut off provisions to persuade the state legislatures to adopt the necessary measures.[82]

The inspection and maintenance programs involve a short visit once a year or every two years to a garage for the check and possibly minor repairs to the vehicle. The inconvenience and costs are low, and the emission reductions are significant.[83] The outcome of the controversy illustrates how central authorities are able to take a longer range perspective than local officials. Because they are less subject to short term political considerations, they were able to persevere in having the program adopted.

At the same time the controversy illustrates the need for both local administration and local political decision-making, even though in the context of federal bounds. The EPA itself was manifestly incapable of running the inspection programs. The programs were possible only when designed and run by local officials in ways consistent

77. Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated*, EPA v. Maryland, 431 U.S. 99 (1977); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated*, EPA v. Maryland, 431 U.S. 99 (1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated*, EPA v. Maryland, 431 U.S. 99 (1977).

78. 42 U.S.C. § 7410(a)(2)(i) (1982).

79. *Id.* § 7506(a).

80. *Id.* § 7616(b)(2).

81. Ostrov, *supra* note 75, at 141.

82. *Id.* at 157-59 (describing the associated administrative and litigation battle).

83. *Id.* at 163-90.

with local needs. The diversity of ways in organizing the inspections reflects these divergent local needs.

c. Diversity

The variety of state administrative and political structures which have been adopted to meet the action requirements of federal legislation further reflects the opportunities for adaptation to local needs. A brief discussion of the institutional arrangements of three states for air pollution control will illustrate the effect of federal legislation. In all three states, new state legislation was adopted in response to the 1970 Clean Air Act.

The Illinois Environmental Protection Act of 1970 created three state agencies.[84] The Illinois Environmental Protection Agency[85] recommends standards,[86] grants permits,[87] and undertakes enforcement action.[88] The latter responsibility is in competition with enforcement actions brought by the attorney general and citizen suits. The Pollution Control Board, comprised of five full time members with its own staff and funds,[89] sets environmental standards and adjudicates disputes.[90] Thirdly, the Illinois Institute for Environmental Quality undertakes planning and research.[91]

The 1970 Washington Clean Air Act[92] created a three member Hearing Appeal Board,[93] but both state officials and the nine active

84. ILL. REV. STAT. ch.111½, para. 1001-61 (1983). For general discussions of the Illinois Act, see E. HASKELL & V. PRICE, STATE ENVIRONMENTAL MANAGEMENT: CASE STUDIES OF NINE STATES (1973); Currie, *Illinois Pollution Law*, 70 NW. U. L. REV. 389 (1975).

85. Created by ILL. REV. STAT. ch. 111½, para. 1004 (1983), given responsibility for federal Clean Air Act duties by para. 1004(m). In 1978 the legislature amended the Act to explicitly provide that state requirements were to be in line with federal requirements. *Id.* para. 1009.1.

86. *Id.* para. 1004.

87. *Id.* para. 1039.

88. *Id.* para. 1004.

89. *Id.* para. 1005.

90. *Id.* para. 1010.

91. *Id.* para. 1006.

92. Wash. Laws 1970, Ex. Sess., ch. 62 (codified as amended at WASH. REV. CODE §§ 43.21B.005-.009 (1985)). The 1970 Act, providing exclusively for the Pollution Control Hearings Board, dovetails with the earlier 1957 Act, (codified as amended at WASH. REV. CODE §§ 70.94..011-.950 (1985)), which regulates air pollution more generally.

93. WASH. REV. CODE § 43.21B.020 (1985). Enforcement options included obtaining judicial injunctions, fines up to $250 per day per violation, and prison terms for up to a year. *Id.* § 70.94.25, .430, .431. The Act also provides for state development of contingency plans for acute air pollution episodes and gives the governor the power to halt emissions on an emergency basis. *Id.* §§ 70.94.710, .715, .720, .725, .730.

regional air authorities[94] could undertake standard setting, permitting, and enforcement.[95] The boards of the regional authorities represent major cities and counties in their territories.[96] Decisions of both state and regional authorities were appealed to the Hearing Appeal Board,[97] after which judicial review in state courts could be sought.[98] Although the state had the power to fix minimum standards,[99] and to substitute itself for the regional authority if it found action by a regional authority inadequate,[100] the regional authorities had substantially greater effective power because of their larger staffs. For example, in 1971 the Puget Sound authority, whose territory included Seattle, had a staff of fifty whereas the entire state staff consisted of only thirty-two people.[101]

In 1972 New York state created a superagency, the Department of Environmental Conservation,[102] with responsibility for air pollution.[103] As in many other states, the principal city, New York City, had a larger enforcement staff for air pollution than the state. Thus the New York City staff of 300 was delegated responsibility for air pollution matters within the city.[104]

C. Conclusion

There are many issues worthy of substantive reflection in any attempt to reform the Clean Air Act. These include questions such as: the wisdom of the Act's "technology forcing" approach; its reliance on command and control regulation to the substantial exclusion of economic incentive approaches; and the significant regulatory burdens which it imposes. The present analysis does not attempt to address these issues. It does, however, support the contention that the basic federal character of United States air pollution control policy is sound and should remain unchanged. Although there is a climate of encouraging reduced federal activity in all fields, and hence a tendency to argue for a reduced federal role in air pollution prevention,

94. E. HASKELL & V. PRICE, *supra* note 84, at 70.
95. WASH. REV. CODE §§ 70.94.141, .151, .152, .181, .211 (1985).
96. *Id.* § 70.94.100. *See* E. HASKELL & V. PRICE, *supra* note 84, at 84.
97. WASH. REV. CODE § 43.21B.110 (1985).
98. *Id.* §§ 43.21B.180, .190, . 0.
99. *Id.* § 70.94.331 (Supp. 1987).
100. *Id.* § 70.94.410 (1985).
101. E. HASKELL & V. PRICE, *supra* note 84, at 41.
102. N.Y. ENVTL. CONSERV. LAW §§ 19-0101-0711 (McKinney 1984 & Supp. 1988).
103. *Id.* § 19-0301; *see* E. HASKELL & V. PRICE, *supra* note 84, at 136.
104. E. HASKELL & V. PRICE, *supra* note 84, at 138.

in fact a federal role has been critical to spurring widespread state action. Notwithstanding the importance of the federal impetus, the primary administrative burden of permitting the approximately 200,000 stationary sources subject to federal requirements[105] is on the states. Moreover, within the constraint of meeting the federal minimum air quality standards, the states have substantial autonomy in establishing organizational and control priorities.

IV. FRANCE

Despite its lack of formal provision for local autonomy, French air pollution control law has delegated substantial authority to local administrative officials of the central government. Accordingly, it is relevant to the present study. In fact, the relations between the local and central bureaucrats manifest phenomena similar to those of the United States system, notwithstanding the absence of local democratic autonomy in the French system. Thus, the French experience also demonstates the usefulness of a central power of impulsion to overcome local inertia.

The French industrial air pollution control program requires significant local bureaucratic decisions. Although these bureaucrats all work for the central state, they have substantial autonomy from the central bureaucracy by being the authorities who deal directly with specific pollution sources. The central authorities cannot effectively eliminate this discretion because of the sheer number of local sources. Moreover, they may not even want to limit such discretion because it spreads responsibility otherwise born exclusively by the central level.[106]

However, the central authority retains its supremacy and the autonomy of the local bureaucrat is not complete. The following three factors limit the autonomy of local bureaucrats: the uniform professional background of the deciding local bureaucrats, the use of branch contracts, and the use of *arretes types*.[107]

After discussing the actual air pollution control program, the prospects for the establishment of local political autonomy in France with respect to air pollution control will be reviewed. So far, the decentralization policy initiated in the first years of the Mitterand presi-

105. *See* Stewart, *Pyramids of Sacrifice?*, *supra* note 10 at 1200 (citing EPA, EPA ENFORCEMENT: A PROGRESS REPORT 5-6 (1975)).

106. In this sense, see J. PADIOLEAU, L'ETAT AU CONCRET 127-28 (1982).

107. "*Arretes types*" are standard orders. *See infra* text accompanying notes 162-163.

dency has had no practical impact on French air pollution control.[108] Prior to the decentralization policy the key administrative actors were the environment ministry, the departmental prefects, and the engineers in the central and peripheral offices of the environment ministry.[109] The environment ministry has been converted into a secretariat of state under the control of the prime minister.[110] The role of prefects is now filled by the *Commissaires de la Republique*, and the peripheral offices of the environment ministry have been renamed. These nominal changes have not altered the preexisting bureaucratic system. Whether the policy of developing local political autonomy, which is the innovation of the decentralization program, will eventually be extended to air pollution control remains to be seen.

A. French Air Pollution Law

The principal laws on air pollution are a 1961 statute which regulates air pollution generally[111] and a 1976 statute[112] which reworks a system of regulating industrial installations traceable back to 1810.[113] These laws have been implemented over the years by a complex of decrees and other administrative actions.

1. General central functions

Two parts of French air pollution control policy without local input are the national standards on the quality of fuel for heating[114] and the administratively determined national limits on vehicle emissions.[115]

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108. Prieur, *La Politique regionale de l'environnement en France*, 1984 REVUE JURIDIQUE DE L'ENVIRONNEMENT 107 (1984) (discusses the limited decentralization of environmental policy with respect to regional planning).

109. *See* M. DESPAX, DROIT DE L'ENVIRONNEMENT (1980).

110. Decree no. 83-297 of Apr. 13, 1983, 1983 Journal Officiel de la Republique Francaise [J.O.] 1171.

111. Law no. 61-842 of Aug. 2, 1961, 1961 J.O. 7195.

112. Law no. 76-663 of July 19, 1976, 1976 J.O. 4320.

113. *See* C. GABOLDE, LES INSTALLATIONS CLASSEES POUR LA PROTECTION DE L'ENVIRONNEMENT 1-11 (1978).

114. The national limit on sulfur content of heating and diesel fuel decreased from 0.5% to 0.3% in 1980 in conformity with Community norms. Orders of Mar. 28, 1980, 1980 J.O. 824; Orders of Dec. 6, 1977, 1977 J.O. 5848. For Community norms, *see infra* notes 346-352. For a complete list of French fuel quality limits, see M. DESPAX & W. COULET, THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN FRANCE 20 (2d ed. 1982).

115. The basic provision is article R. 69 of the Code de la Route, decree no. 69-150 of Feb. 5, 1969, 1969 J.O. 1479, 1969 Receuil Dalloz-Sirey, *Legislation* [D.S.L.] 87, 92, which specifies that vehicles should not cause emissions "*susceptibles d'incommoder la population ou de compromettre la sante et la securite publiques.* (likely to inconvenience the people or compromise

Zones of special protection may be created for major urban areas to reduce emissions from heating and other combustion.[116] Because the four existing zones for Paris, Lille, Lyon, and Marseille were established several years apart, it can be presumed that local political preferences could play an actual role in the designation of such zones, even though the decree regulating establishment of the zones leaves all responsibility to the central administration.

The active national air quality monitoring program, commenced in 1971, likewise permits token local input.[117] There are 120 pollution monitoring networks linked by computer distributed throughout France.[118] These networks are used to provide background information and, for nine of the monitoring networks, to determine when to order fuel switching or closing of major industrial facilities because of peak concentrations.[119] At the national level the environment ministry is responsible for the monitoring program.[120] At the local level,

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the public health and security)." Based on this decree and the express references of an air pollution law, the law of Aug. 2, 1961, 1961 J.O. 7195, to vehicular pollution, central authorities have issued a series of *arretes* (orders).

In conformity with Community directives, these orders establish norms for new cars. Carbon monoxide and hydrocarbon emissions were first regulated effective September 1, 1972. Order of June 30, 1970, 1970 J.O. 8191. In 1975 national controls were administratively adapted to the 1974 amendments of the Community standards. 1975 J.O. 2207, 2216, 2229. Nitrogen oxide emissions from gasoline cars were regulated after October 1, 1977 pursuant to European Economic Community [EEC] directive 77/120/EEC, 1977 J.O. 7064. The limits for carbon monoxide, hydrocarbons, and nitrogen oxides were reduced 15, 10, and 15 percent respectively after October 1, 1979 in compliance with Community rules. Order of Oct. 4, 1977, 1977 J.O. 7064. The limits are subject to change in conformity with new EEC standards.

Smoke limits for diesel engines as a function of motor size were established effective October 1, 1975 by the order of Feb. 13, 1974, 1974 J.O. 3965, and updated by the order of Jan. 3, 1978. 1978 J.O. 721. The sulfur content of gas oil has been regulated by the same provisions as domestic fuel. The limits are subject to change pending new EEC standards.

In compliance with Community norms lead limits in gasoline were set at 0.50 grams/liter as of January 1979, and 0.40 grams per liter as of January 1981. Orders of Oct. 13, 1978, 1978 J.O. 3649-50.

116. Articles 2 & 3, decree no. 74-415 of May 13, 1974, 1974 J.O. 5178, permit the establishment of zones of special protection by interministerial decree. Zones have been established for Paris, order of Aug. 11, 1964, 1964 J.O. 7617, modified by order of Sept. 22, 1978, 1978 J.O. 3597, suburban Paris, order of Sept. 22, 1978, 1978 J.O. 3598, Lille, order of Feb. 26, 1974, 1974 J.O. 2602, Lyon, order of Feb. 1974, 1974 J.O. 2603, and Marseille order of Apr. 8, 1981, 1981 J.O. 3993.

117. *See* Dambrine & Bartaire, *Air Pollution Monitoring Networks in FRANCE/Implementation of the European Directive 80/779/EEC*, MINISTERE DE L'ENVIRONNEMENT 2 (Aug. 1984); F. BILLAUDOT & M. BESSON-GUILLAUMOT, ENVIRONNEMENT URBANISME CADRE DE VIE: LE DROIT ET L'ADMINISTRATION 267-68 (1979).

118. Dambrine & Bartaire, *supra* note 117, at 4.

119. *Id.* at 5.

120. *Id.* at 6.

the peripheral offices of the environment ministry under the direction of the *Commissaires de la Republique* have this responsibility.[121] If an individual plant is responsible for most emissions in an area, it pays for and runs a monitoring network. Otherwise, monitoring networks are to be run by local associations composed of industry, municipal government, state bureaucracy, and local environmental group representatives.[122] Although there are those who point to this control of local monitoring networks as an example of local autonomy, the issues over which the local body has control are of too minimal an importance to involve the local political responsibility inherent in the concept of autonomy.

The *Agence pour la Qualite de l'Air* (Clean Air Agency), in operation since 1983,[123] facilitates and performs activities of surveillance, prevention, and distribution of information with regard to air pollution. It is directed by a council composed one third each of state, local government, and various interest group representatives. The agency is empowered to borrow, give subsidies, and collect air pollution taxes.[124] The Agency's action has been limited to subsidizing research, development, and demonstration monitoring networks and to public education.[125]

2. Classified installation system

The classified installation system regulates industrial pollution. The objectives of the law on classified installations are to protect health, public safety, and the environment.[126] Balancing the costs and effectiveness of available control techniques against the desired environmental quality of the surrounding area is an integral part of the statute's implementation. The permits issued under the law must take into account:

d'une part, de l'efficacite des techniques disponibles et de leur

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121. *Id.*

122. *Id.* at 6-7.

123. The law no. 80-513 of July 7, 1980, 1980 J.O. 1704, established the agency. *See* AGENCE POUR LA QUALITE DE L'AIR, RAPPORT D'ACTIVITE 3 (1983) [hereinafter AGENCE].

124. 1980 J.O. 1704.

125. AGENCE, *supra* note 123, at 3.

126. The sources covered by the law no. 76-663 of July 19, 1976, 1976 J.O. 4320, include not only new industrial installations, but also state and local installations (with the notable exception of nuclear power plants), noncommercial installations, and petroleum related installations (which had previously been exempted). Decree no. 77-1133 of Sept. 21, 1977, 1977 J.O. 4897, implemented the 1976 law. *See generally* C. GABOLDE, *supra* note 113; M. PRIEUR, PREMIERE PARTIE, LA POLLUTION ATMOSPHERIQUE EN DROIT FRANCAIS (1976).

> *economie, d'autre part, de la qualite, de la vocation et de l'utilisation des milieux environnants* (on the one hand, the efficiency and economy of the available techniques, and on the other, the quality, designation, and use of the surrounding areas).[127]

In accordance with the philosophy of balancing and realistic assessment of costs, the engineers who evaluate permit applications are first instructed to perform a technical and economic review of the emission controls which could be imposed on the source with a view to requiring the best technology economically achievable. A second part of the analysis is to consider whether the residual emissions will be compatible with the desired quality of the ambient environment. The general emphasis is to be on prevention rather than waste treatment.[128]

The *Conseil d'Etat*, the highest central administrative body as well as the administrative court of last instance, is to establish lists of first and second class industrial activities.[129] Installations falling within one of the first class categories are required to hold an operating permit from the departmental prefect (now *Commissaire de la Republique*). Such permits are issued following the *enquete publique* procedure designed to solicit public comment on the permit application.[130] Installations of the second class are required only to declare themselves to the prefect. The 1976 law on classified installations reformed the previous 1917 law. Although it formally expanded the coverage of the classified installations regulatory scheme, in practice control may have been lessened. Not only has the *Conseil d'Etat* been

127. Article 17, decree no. 77-1133 of Sept. 21, 1977. This article incorporates the principle firmly established in French administrative law by the well known decision of the Council of State in *Ville Nouvelle Est*. Decision of May 28, 1971, *Conseil d'Etat* (Council of State), 1972 Receuil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 194. The Council of State held that in expropriation of private property for a public purpose, the declaration of public utility is proper only if the burdens imposed on private property rights and the financial costs are not excessive with regard to the interest motivating the expropriation. For extensive literature commenting on the case, see R. Hostiou, *Amenagement et environnement: le contentieux associatif devant les juridictions administratives*, 10 DROIT ET VILLE 215, 223 n.29 (1980); *see also* F. CABALLERO, ESSAI SUR LA NOTION JURIDIQUE DE NUISANCE 93-103 (1981) (who after identifying the decision as the foundation of a new principle of cost benefit analysis in French administrative law concludes that as a practical matter it has little relevance).

128. MINISTERE DE L'ENVIRONNEMENT ET DU CADRE DE VIE, INDUSTRIALISATION AND ENVIRONMENTAL PROTECTION IN FRANCE 4-5 (Apr. 1979) [hereinafter ENVIRONMENT MINISTRY].

129. Article 28, law no. 76-663 of July 19, 1976; *see also* C. GABOLDE, *supra* note 113, at 32-40.

130. Law no. 83-630 of July 12, 1983, 1983 J.O. 2156; art. 5, law no. 76-663 of July 19, 1976, 1976 J.O. 4320; art. 5 of decree no. 77-1133 of Sept. 21, 1977, 1977 J.O. 4897.

hesitant to expand the list of industries covered,[131] but it has also significantly raised the threshold limits permitting an industrial installation to operate merely by declaration.[132]

Each year about 2500 permits are issued after an *enquete publique* for new or modified first class installations.[133] There exist about 50,000 first class and 550,000 second class installations.[134] About 10,000 declarations regarding second class installations are registered annually.[135]

B. Limitations on Local Bureaucratic Autonomy

Three factors significantly limit local bureaucratic independence generally, and the prefect's autonomy in particular. These factors are: (1) the uniform professional training of the engineers who actually determine the content of air pollution permits (*corps des mines*), (2) branch contracts, and (3) *arretes types* (standard orders).

1. *Corps des mines*

The engineers of the *corps des mines* who process individual permit applications are crucial to the French system of air pollution control because of the case by case balancing approach it adopts. Their competence makes case by case determinations feasible. And, the elite character of the corps ensures substantial uniformity of approach.

Through the early 1970's the corps had only 300 members.[136] These engineers graduate from an *Ecole des Mines*, prestigious schools located in Paris, St. Etienne, and Nancy,[137] at which only about 190 students are accepted each year.[138] The successful applicants are virtually all graduates of the *Ecole Polytechnique*, a military school through which much of the French political and corporate elite passes.[139] At the *Ecoles des Mines*, the professors are overwhelmingly members of the *corps des mines*.[140]

131. F. CABALLERO, *supra* note 127, at 53.
132. *Id.* at 109-112.
133. ENVIRONMENT MINISTRY, *supra* note 128, at 4.
134. F. BILLAUDOT & M. BESSON-GUILLAUMOT, *supra* note 117, at 261.
135. ENVIRONMENT MINISTRY, *supra* note 128, at 4.
136. E. SULEIMAN, ELITES IN FRENCH SOCIETY: THE POLITICS OF SURVIVAL 210, 218 (1978).
137. *Id.* at 69.
138. *Id.*
139. *Id.* at 29, 39, 99.
140. *Id.* at 120, 123.

The members of the *corps des mines* who evaluate permit applications work in a *Direction Regionale de l'Industrie et de la Recherche* (Regional Office of Industry and Research).[141] Each Regional Office may assist the prefects of as many as nine departments.[142] Each *Direction* is a peripheral office of the environment ministry. The levels of pollution control required for each permit are determined by negotiation between the engineer and the industrial installation in light of the economic ability of the installation to implement them.[143] It is almost unthinkable that an industrial installation would be closed for failure to conform to permit conditions.[144]

There are a number of reasons that members of the corps des mines get along well with industry. Although its members work for the environment ministry, they are largely on loan from the ministry of industry. At the environment ministry's creation in 1971, the problem of staffing the ministry was resolved by lending it personnel from other sources.[145] Thus in 1971 there were 377 engineers on loan from the ministry of industry to the environment ministry.[146]

What happened in 1970, however, was more than the simple resolution of a personnel resource problem. The *corps des mines* is but one of a number of elite corps. Its long standing rival is the *corps des ponts et chaussees*,[147] traditionally responsible for public works construction. In the early 1970's as the *corps des ponts et chaussees* was becoming active in urban and regional planning, the *corps des mines* jump into the environment ministry represented a means of maintaining its position relative to its traditional rival.[148] In fact the "lending" of personnel from a *grand corps* to other state administrations is a

141. Each Regional Office has sections responsible for various kinds of environmental problems including air pollution.

142. DOCUMENTATION FRANCAISE, REPERTOIRE PERMANENT DE L'ADMINISTRATION FRANCAISE 296 (39th ed. 1981).

143. F. CABALLERO, *supra* note 127, at 129, 149.

144. *Id.* at 149.

145. *[L]es directions et services des administrations centrales charges de ces attributions sont places sous son autorite et les services departementaux et regionaux des administrations concernees sont mis a sa disposition en tant que besoin* (The offices of the central administrations charged with these attributions are placed under its authority, and the departmental and regional services of the administrations concerned are placed at its disposition as needed.)

Article 2, decree no. 71-94 of Feb. 2, 1971, 1971 J.O. 1182.

146. M. DESPAX, DROIT DE L'ENVIRONNEMENT 521 (1980).

147. The *corps des ponts et chaussees* is the corps of bridges and ways, the group of engineers responsible for public works.

148. E. SULEIMAN, *supra* note 136, at 214-17.

common practice and serves to increase the prestige of the corps.[149]

Moreover, the engineers have close links with the industry they regulate. Since 1969 they have received an additional preparation in a training institute financed jointly by the public bureaucracy and by industry. They share this course with the industry engineers with whom they are to deal in their regulatory activity.[150] Graduates of the *ecoles des mines* also routinely move from positions as civil servants to important jobs with industry.[151]

The competence of the *corps des mines* is undoubtedly an asset to the implementation of French air pollution control. However, the origin of the corps in the ministry of industry necessarily affects its outlook on environmental issues.

2. Branch contracts

Five branch contracts, dealing principally with water pollution, were signed by the Minister of Environment and industry representatives between 1972 and 1977.[152] In these contracts the industrial parties and the Minister agreed on a timetable for control and the extent of control. The industrial parties received subsidies for control investments. The contracts' contents were then embodied by the environment ministry in orders binding on the prefects.

From 1972 to 1980 there were six branch programs, distinguished from branch contracts in that no government subsidies are involved.[153] These agreements affected industries with significant air pollution problems and principally involved agreements with industry on the timing and extent of pollution control investments. In an additional case, an agreement was reached with a large conglomerate,

149. E. SULEIMAN, POLITICS, POWER, AND BUREAUCRACY IN FRANCE: THE ADMINISTRATIVE ELITE 243-47 (1974).

150. *Id.* at 158-59.

151. E. SULEIMAN, *supra* note 136, at 210.

152. The contracts were signed with the following industries: *Pate a papier* (paper mills) (1972), *Industrie sucriere* (sugar refining industry) (1973), *Feculerie, levurie* (starch and yeast factories) (1975), *Distillerie* (distilleries) (1975), and *Delainage, megisserie, lavage et peignage de laine* (wool processors) (1977). For descriptions of the contracts and of the generally positive results obtained, see AGENCE PRESSE ENVIRONNEMENT, LA POLITIQUE CONTRACTUELLE D'ANTIPOLLUTION (LE MOIS DE L'ENVIRONNEMENT (DOSSIERS)) 5-7 (Nov. 1980).

153. These agreements were with the following industries: *Cimenteries* (cement) (1972), *Traitements de surface* (surface treatments) (1972), *Electrolyse des chlorures alcalins* (electrolosis of alkyl chlorides) (1974), and *Equarrissages* (fertilizer manufacturers) (1977). For details of the agreements and of the generally successful results obtained, see ENVIRONMENT MINISTRY *supra* note 128, at 8-12. The branch program for the cement industry is discussed in J. PADIOLEAU, *supra* note 106. *See also* the agreements referenced in notes 154 and 156.

Pechiney-Ugine-Kuhlmann, on the controls to be applied to its various businesses.[154] Other large French companies did not seek such agreements, preferring instead to negotiate with the environment ministry on problems as they arose.[155]

One example of a branch program is that dealing with air pollution from asbestos. The branch contract was signed by the environment minister and the two firms which represent 80% of French asbestos consumption.[156] Provisions of the contract[157] concerning work processes and pollution control investments were then embodied in a technical instruction issued by the environment ministry to the prefects to guide their application of the law on classified installations.[158]

The legality of contractual agreements with industry has been questioned on the theory that the administration ought not to be able to bargain over matters which are within its unilateral duty to regulate.[159] Administrative jurisprudence has avoided facing the question.[160] Likewise, the contractual agreements have been criticized as lessening the obligations that would otherwise be imposed on industry.[161] These criticisms have practical merit only to the extent that all of the theoretically applicable controls would in fact be rigorously applied absent a collective agreement.

3. *Arretes types*

Another kind of instrument used to limit discretion, the *arrete type*, is an order issued by the Environment Ministry. It can be issued as a *circulaire* (circular), as an *instruction* (direction), or as an *arret* (order). It may or may not be published in the Journal Officiel de la Republique Francaise.[162]

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154. For details, see ENVIRONMENT MINISTRY, *supra* note 128 at 3.

155. Author's personal conversations with French industrialists.

156. ASSOCIATION FRANCAISE DE L'AMIANTE, ASSOCIATION FRANCAISE DE L'AMIANTE: L'INDUSTRIE REND COMPTE DE CINQ ANNEES DE TRAVAIL 31 (1981).

157. For text, see *id.* at 100-08.

158. Technical instruction of Jan. 29, 1981. For text, see *id.* at 109-13.

159. F. CABALLERO, *supra* note 127 at 152-57.

160. *Id.*

161. *Id.*

162. A publication of the environment ministry compiles twenty-five of these *arretes types*, MINISTERE DE L'ENVIRONNEMENT ET DU CADRE DE VIE, PRINCIPAUX TEXTES LEGISLATIFS ET REGLEMENTAIRES RELATIFS A LA LUTTE CONTRE LA POLLUTION ATMOSPHERIQUE, INSTALLATIONS CLASEES (DIRECTION DE LA PREVENTION DES POLLUTIONS, SERVICE DES PROBLEMES DE L'ATMOSPHERE) (Apr. 1979). Of the twenty-five texts, twenty were *circulaires* published in the Journal Officiel de la Republique Francaise [Journal Officiel]. One was

Arretes types have been issued for a large number of very specific kinds of industrial installations. They are ordinarily quite precise as to what technical controls must be applied. The fact that standards can be established unilaterally by the Environment Minister via *arretes types* has, incidentally, been an important incentive for the industrial parties to branch agreements to negotiate them.

Arretes types, like branch contracts, bind the prefects (now *Commissaires de la Republique*, analogously to how SIP's and NSPS's constrain state permitting decisions in the American system. In practice they bind the prefect thereby preventing excessive susceptibility to local interests and pressures.[163] They also provide for application of a level of technical expertise which, despite the existence of support to the prefect by the *corps des mines*, could not otherwise be brought to bear on each individual case. Yet, the prefect still has responsibility for application of the *arrete type* to each permit application. Such delegation relieves central authorities of a substantial administrative burden and, within the bound of the *arrete type*, permits local appreciation of the unique facts of each application.

C. The French Approach to Community Law

Because France is a unitary state[164] whose constitution vests substantial power in the public administration, it has not had difficulty in complying with European Economic Community environmental directives.[165] Community norms have been routinely incorporated into French environmental law by administrative order.[166] The reticence of the French judiciary towards Community law is accordingly not a

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an *arrete* published in the Journal Officiel, and two were unpublished instructions. They were all technical, formulated in mandatory style, and directed to very specific kinds of industrial installations, *e.g.*, sugar beet refineries, storage depots for nonrefrigerated liquid ammonia, alkaline chloride electrolysis workshops, etc. A more complete listing can be found in Installations Classees pour la Protection de l'Environnement, no. 1001, Tome I (Textes Generaux, Nomenclature) 1979, no. 1001-I; Tome II (arretes types) 1978, no. 1001-II; Tome III (Arretes, circulaires et instructions) 1978, no. 1001-III; and updating supplements, Journal Officiel de la Republique Francaise; *see also* M. DESPAX & W. COULET, *supra* note 114, at 21.

163. However, such susceptibility is presumably less than in other systems' local authorities by virtue of the fact that prefects are administrative agents of central authorities.

164. Here "unitary state" is used to distinguish from a federal state, such as the United States, or a regional state, such as Italy or Spain.

165. Community air pollution directives are reviewed *infra* at notes 346-375. For an overview of the French approach to Community law, see T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW, 232-37 (1981).

166. *See, e.g., supra* notes 114-115 and accompanying text.

major factor in French air pollution control.[167]

167. The French courts have disagreed on the acceptability of Community law. Article 55 of the constitution provides for the supremacy of regularly ratified or approved international law so long as such law is reciprocally applied by other states. In 1975 the Conseil Constitutionnel (Constitutional Court) seemed to open the way for easy acceptance of Community law. Judgment of Jan. 15, 1975, 1975 Receuil Dalloz-Sirey, Jurisprudence [D.S. Jur.] 529. In a case challenging a proposed law on abortion as inconsistent with the European Convention on Human Rights, the Constitutional Court held that a refusal to apply a national law because of its inconsistency with an international rule is not an exercise of constitutional review jurisdiction. Under this holding, the ordinary civil and administrative courts could address questions of both the applicability of Community law and of its supremacy over national law without crossing the boundary into the territory of constitutional review, from which they are prohibited.

The *Cour de Cassation* (France's highest court of ordinary jurisdiction) a few months later followed the Constitutional Court's lead. Judgment of May 24, 1975, Cass. ch. mix., 1975 D.S. Jur. 497, 506; 2 COMMON MKT. L.R. 336 (1975). The court held that Community law took priority over national law enacted subsequent to ratification of the EEC Treaty. It also found that the power of member states to bring proceedings before the European Community Court of Justice against other member states which fail to comply with the EEC Treaty satisfied the reciprocity requirement. Shortly afterwards it held that the Treaty also prevails over earlier French legislation. Judgment of Dec. 15, 1975, Troisième section civile [Cass. civ. 3e], 1976 D.S. Jur. 33, 39-40; 2 COMMON MKT. L.R. 152 (1976).

Unfortunately for the application of Community jurisprudence, the Council of State (the highest administrative court) has rejected this principle. Judgment of Oct. 22, 1979, Conseil d'Etat, 36 L'ACTUALITE JURIDIQUE: DROIT ADMINISTRATIF 39 (1980); *see also* Judgment of Mar. 1968, Conseil d'Etat, 1968 D.S. Jur. 285, 286; 1970 COMMON MKT. L.R. 395 (refusal to disapply legislative text conflicting with earlier Community regulation). In a case challenging the election procedures for representatives to the European Parliament, the Council of State observed that assessing the conformity of a national law adopted subsequent to the EEC Treaty would be equivalent to passing on its constitutionality, a power which the Council of State lacks. Judgment of Oct. 22, 1979, Conseil d'Etat, 36 L'ACTUALITE JURIDIQUE: DROIT ADMINISTRATIF 39 (1980). If the Council of State persists in its view that disapplication of a national law because of its nonconformity with Community law is a constitutional question, the effective supremacy of Community law will be seriously limited in France. This is because the Constitutional Court can only pass on the constitutionality of a law prior to its promulgation.

Moreover, the Council of State has created an additional barrier to the application of Community law in France. It has squarely rejected the Court of Justice's view of direct applicability by holding that only acts first received into national law may have any effect in internal law. Judgment of Dec. 22, 1978, Conseil d'Etat, 1979 D.S. Jur. 155 (commonly known as Cohn-Bendit); reconfirmed by Savincast, Nov. 28, 1980, Centre international dentaire, Feb. 25, 1981.

Even more threatening for the application of Community law than rejection of the direct effect doctrine is the reasoning by which the Council of State reached this conclusion. The Council of State rejected the direct effect doctrine based on a literal reading of article 189 of the treaty. It found the treaty language to be so clear that no reference to the Community Court was required to interpret it. Reliance on the so called *acte clair* doctrine provides the Council of State with an easy way to avoid its obligations under article 177 of the EEC treaty to refer questions to the Court of Justice. *See generally* Bebr, *The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice*, 20 COMMON MKT. L. REV. 439 (1983).

D. The 1982-83 Decentralization Reform

The 1982-1983 decentralization reform was (and remains) a significant departure from previous French practice. Although numerous attempts have been made over the years to decentralize bureaucratic responsibility, no previous attempt had tried to combine local bureaucratic responsibility with local political autonomy.[168] The territorial fragmentation of France (36,000 communes of which 28,000 have populations of less than 2,000)[169] and the fear of encouraging clientelism[170] effectively impeded such decentralization.

The 1982 law addressing rights and liberties of communes, departments, and regions instituted the decentralization policy.[171] It gives these territorial subdivisions new significance.

Regions were statutorily instituted in 1972 as strictly administrative structures with economic planning, coordination, and infrastructure related resposibilities.[172] They were run by regional prefects whose duties paralleled those of the departmental prefects about to be described.

Unlike the regions, communes and departments have existed since the French revolution. Following the chaos of the revolution, the departments were established as administrative territories within which it was possible to reach the central seat of administration by

168. Although decentralization was never undertaken until 1982, it was certainly talked about a lot. *See* Y. MENY, CENTRALISATION ET DECENTRALISATION DANS LE DEBAT POLITIQUE FRANCAIS (1945-1969) (1974) (commenting on the development of themes of participation, responsibility, legitimacy, and autonomy in French political debate on decentralization).

169. Meny, *Amministrazione statale e poteri locali in Francia*, 1984 RIV. TRIM. DI DIRITTO PUBBLICO 556, 558 [hereinafter Meny, *Amministrazione*]; *see also* Meny, *La politica de decentramento in Francia del governo Mauroy: Legittimazione, integrazione e burocratizzazione*, 12 LE REGIONI 332, 339-40 (1984) [hereinafter Meny, *La politica*]. Italy in contrast has only about 8,000 communes. S. CASSESE, IL SISTEMA AMMINISTRATIVO ITALIANO 144 (1983). Of these, about 90% have less than 10,000 inhabitants, and only 1% have more than 60,000. *Id.* at 163.

170. Meny, *Amministrazione*, *supra* note 169, at 562-63.

171. Law no. 82-213 of Mar. 2, 1982, 1982 J.O. 730, *amended by* 1982 J.O. 779 (relating to the rights and immunities of communes, departments, and regions). The Conseil Constitutionnel found the law constitutional except for a provision making local government decisions executory before the representative of the central government had a chance to determine whether to institute review before the administrative courts. Decision no. 82-137 DC of Feb. 25, 1982, 1982 J.O. 759; 38 L'ACTUALITE JURIDIQUE: DROIT ADMINISTRATIF 294 (1982). Law no. 82-623 of July 22, 1982, 1982 J.O. 2347, remedied this problem. For lists of implementing texts, see Y. MENY, ADMINISTRATION 82 53-57 (1983); M. HENRY-MEININGER & Y. MENY, ADMINISTRATION 83 16-20 (1984) [hereinafter ADMINISTRATION 83].

172. Law no. 72-619 of July 5, 1972, 1972 J.O. 7176.

one day's travel. The law of 28 *pluviose an* 8 (February 17, 1800)[173] created the prefectoral system to run the departments and to oversee the communes. Initially, the central government chose both prefects and mayors.[174] As the nineteenth century progressed, mayors and the municipal and departmental councils came to be elected.[175] However, the departmental prefect retained ultimate authority for all local administrative decisions.

The prefects constituted a relatively homogeneous professional corps of bureaucrats.[176] There was low turnover within the corps, and prefects were frequently rotated from one department to another.[177]

Two developments eroded the prefects' authority. The creation of field services in the new, specialized ministries following the Second World War limited the prefects' power because the prefects lacked the knowledge to control the ministries' activity.[178] Moreover, although mayors as local elected officials formally had little power, the cumulation of local and national elected offices gave them jointly the political power to control the prefects' careers.[179] A prefect was no match for a mayor of a large city, who was also a member of parliament and perhaps even a minister. This was, of course, irrelevant to the vast majority of small communes.

The 1982 law retained the concept of elected councils for communes and departments, and anticipated the creation of a popularly elected regional council.[180] The mayor's election by the municipal council also remained unchanged. The great innovation of the 1982 law was to make local government independent of the central administration by removing the former control by prefects over local governmental actions. To do this it abolished the departmental and regional prefects. The law established that the popularly elected regional and departmental councils are to choose from their respective bodies a regional[181] and a departmental[182] president. These presidents

173. H. MACHIN, THE PREFECT IN FRENCH PUBLIC ADMINISTRATION 17 (1977).
174. J. VIE, LA DECENTRALISATION SANS ILLUSION 27 (1982).
175. *Id.* at 33-34.
176. H. MACHIN, *supra* note 173, at 188-293.
177. *Id.*
178. *Id.* at 31, 139-42; *see also* Auby, *La nouvelle organisation departementale*, 38 L'Actualite Juridique: Droit Administratif 331, 337 (1982).
179. H. MACHIN, *supra* note 173, at 34.
180. Law no. 82-213 of Mar. 2, 1982, art. 59, 1982 J.O. 730, *amended by* 1982 J.O. 779.
181. *Id.* art. 71.
182. *Id.* art. 24.

are to assume the prefect's previous position as the territorial official with executive power.[183] The prefect was replaced by a representative of the state (*Commissaire de la Republique*).[184] In theory the only central control remaining over the acts of communes, departments, and regions was the power of this representative to refer acts to the administrative courts for a review of their legality.[185] Because of the previous erosion of prefectoral authority, abolition of the prefects, while of unquestionable symbolic importance, is not the most important result of the law. The most important results were the potential for reduction of central administrative control and the establishment of local democratic power.

Additionally, the 1982 law restricted control of local decision-making to the local elected assemblies and administrative judicial review. Other potential instruments, such as referendums or public hearing procedures,[186] were not authorized.

Further, the 1982 law established the structure of local government, but said nothing about which subjects local authorities would govern. A 1983 law[187] started the process of transferring powers to local government entities. This process has been continued by a complicated set of measures giving the local government entities their own financial resources in the form of block grants from the State.[188] The principal subject matter transfers so far have involved education and social benefits. Responsibility for these two subject areas is now shared in a complex way between the state and the three local government levels. Criteria involved in the distribution of responsibility include the size and importance of the facilities involved and whether personnel or capital decisions are involved.[189]

Many question the wisdom of decentralization. One former prefect fears that local democracy will not produce management as effective as the prefectoral system. He believes that local control will

183. *Id.* arts. 25-26 (for departments); art. 73 (for regions); *see also* art. 11, law no. 83-8 of Jan. 7, 1983, 1983 J.O. 215-20, *amended by*, 1983 J.O. 706 (regarding the reallocation of jurisdiction among the communes, the departments, the regions and the state).

184. Law no. 82-213 of Mar. 2, 1982, art. 34, 1982 J.O. 730, *amended by* 1982 J.O. 779, (department); art. 79 (region).

185. *See id.* arts. 3, 46, & 69, for communes, departments, and regions respectively. The state representative for the department is the referring authority for both communes and the department.

186. Meny, *La politica*, *supra* note 169, at 339-40.

187. Law no. 83-8 of Jan. 7, 1983 J.O. 215.

188. *See* ADMINISTRATION 83, *supra* note 171 at 12-13.

189. *Id.* at 11-12.

politicize decision-making in a negative way, that local decisionmakers will consider only the short run, and that regional imbalances will be exacerbated.[190] The 1982 law also created new administrative structures without suppressing the old ones. This multiplication of structures will lead either to inefficiency or to the need for state control sufficiently detailed to frustrate the aims of decentralization.[191] In fact the state retains substantial means to control local discretion. The 1982 law instituting the regionalization process provided that the state could limit local discretion by imposing technical norms under national laws or under decrees in application of a national law provided that such norms were generally applicable to individuals or to legal entities (under either public or private law).[192]

It is difficult to foresee the medium and long term results of decentralization in France. One possibility is that the decentralization policy will have little effect on the conduct of government decision-making. The local administrations of major cities will continue to have the degree of independence they had already de facto achieved under the old system. The only substantive difference could be that the judicial review of decision-making by the numerous small communes will prove less flexible and accommodating than prefectoral control. Another scenario is that local autonomy could become quite real and lead to strong politicization of local decision-making along with extensive patronage arrangements.[193] Perhaps the most that can be asserted for the present is that the French experiment with decentralization offers an opportunity for achieving greater legitimacy through local democratic responsibility. Whether the relative soundness of the previous system of central administration will be retained and even whether the decentralization policy will amount to more than window dressing are questions which it is as yet too soon to answer.

E. Conclusion: the Lack of Local Democratic Control

The French tradition of central control and technocracy has produced a system analogous to that of the United States with regard to the relationships between central and local authorities. This similarity is surprising given the structural differences between the two sys-

190. J. VIE, *supra* note 174, at 118-23.
191. Meny, *La politica*, *supra* note 169, at 343-49.
192. Law no. 82-213 of Mar. 2, 1982, art. 90, 1982 J.O. 730, *amended by* 1982 J.O. 779.
193. These two possibilities are hypothesized by Meny, *La politica*, *supra* note 169.

tems. Specifically, French central authorities have provided minimum control levels for local permitting decisions through branch contracts and *arretes types* paralleling the minimum standards the United States Congress has imposed on the states.

Moreover, French central authorities ensure efficient local action on permitting decisions by providing the staff which evaluates permit applications. In addition to ensuring that local action occurs, the staffing of the central and local offices of the environment ministry by an elite corps of engineers provides the expertise which makes feasible the case by case determinations required by the French approach to air pollution control.

Although the United States EPA passes primarily on the sufficiency of local permitting efforts through its approval of SIPs and assumes local permitting responsibility only as a last resort, the net result of ensuring action is the same in both systems. The requisite degree of uniformity is maintained by intervention of the environment ministry through informal administrative review and through use of arretes types and branch contracts dealing with entire categories of industry.

The substantial difference between the United States and French systems is that the French bureaucratic centralization has left virtually no meaningful role for local democratic input to the local bureaucratic decision-making.[194] This poses a serious legitimacy problem, which might be ameliorated by transferring the peripheral offices of the environment ministry from the prefects' (*Commissaires' de la Republique*) authority to the authority of the elected regional or departmental councils. Because of the administration's broad powers under the present constitution to act independently of legislative checks, special attention ought to be given to curing the local legitimacy problem in the context of the decentralization policy.

V. ITALY

Italy's air pollution control program suffers from a lack of resources, poorly conceptualized administrative organization,[195] and ex-

194. Padioleau urges the incorporation of local public input as an important reform. J. PADIOLEAU, *supra* note 106, at 136.

195. *Una peculiare e non secondaria ragione di inefficienza degli apparati pubblici in materia di ambiente e sempre stata individuata in una legislazione che, come la nostra, affidi compiti di tutela e salvaguardia a troppi poteri, ciascuno dei quali ha un pezzo di competenza e dispone di strutture ad essa correlate. Con la nota consequenza che quando i poteri sono troppi e non coordinati tra loro e come se non ci fosse alcun potere.*

cessively frequent reforms. Administrative reorganizations or new air pollution laws have occurred every three or four years since the mid 1960s.

Although the Italian Parliament produces a great quantity of statutes, it frequently overlooks the problems involved in their implementation. Consequently, Italian legislation is characterized by a lack of: (1) clear language, (2) funding provisions, and (3) identification of the administrative bodies responsible for its implementation.[196] Italy's specific legislation on air pollution shares these general characteristics.

Italy has not had any effective central administrative power for air pollution control. Some tools to modify this state of affairs are available to central level executive authorities. The Italian judicial system also provides a number of partial remedies. Additionally, Community rules may work to provide the central impetus and control now lacking. Despite these possibilities for improvement, the status quo may persist. General confusion about the proper organization of government, including problems of clientelism and of the distribution of powers between local and central authorities, impedes reform and promotes the current pattern of general inaction interrupted by occasional isolated interventions.

A. Constitutional context

The Italian constitution of 1948 declares Italy to be a regional state.[197] Italy is now divided into fifteen ordinary statute regions and five special statute regions. The five special statute regions have special charters approved by constitutional laws. These charters give

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(A peculiar and non secondary reason for the inefficiency of the public bureaucracy in environmental matters is our legislation which gives protective powers to too many powers, each of which has only a fragmented piece of jurisdiction. The notable consequence is that when powers are too many and non coordinated, it is as if there were no power.)

F. GIAMPIETRO, DIRITTO ALLA SALUBRITA DELL'AMBIENTE: INQUINAMENTI E RIFORMA SANITARIA 57 (1980); *see also* G. AMENDOLA, IN NOME DEL POPOLO INQUINATO: MANUALE GIURIDICO DI AUTODIFESA ECOLOGICA 57-59 (1985) (complaining of the lack of administrative infrastructure and of the lack of clarity in the overlapping laws treating air pollution); A. POSTIGLIONE, MANUALE DELL'AMBIENTE: GUIDA ALLA LEGISLAZIONE AMBIENTALE 40-41 (1984).

196. *See* A. Postiglione, Manuale dell'ambiente: Guida alla legislazione ambientale 40-41 (1984); Marziale, *I 'Suggerimenti per la redazione dei testi normativi' della regione Toscana: un esempio da imitare*, 108 Foro Italiano V [Foro It. V] 265 (1985).

197. *See* P. BARILE, ISTITUZIONI DI DIRITTO PUBBLICO 423-54 (3d ed. 1978); Putnam, Leonardi, Nanetti, & Pavoncello, *Explaining Institutional Success: The Case of Italian Regional Government*, 77 AM. POL. SCI. REV. 55 (1983).

them a slightly greater degree of autonomy than that provided for ordinary statute regions. All regions have popularly elected regional councils which select from their number a regional executive committee and a president.

Article 117 of the Constitution lists the subject matters in which regions have legislative competence within the bounds of national framework laws. Article 118 provides that the regions are to have administrative competence for the subject matters listed in article 117,[198] along with administrative competence for such other matters as the State may delegate.

The Constitution provides a complicated mechanism for central control of regional legislative acts. The Constitutional Court has jurisdiction to determine whether regional legislative action exceeds the bounds of article 117. If the central government is dissatisfied with the merit of a regional law, it may request the regional council to reconsider it.[199] Further, if a regional council acts contrary to the Constitution or commits grave violations of law, the President of the Republic may dissolve the regional council and require new elections.[200]

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198. Article 117 provides:

Within the limits of the fundamental principles established by the laws of the State, the Region legislates in regard to the following matters, provided that such legislation is not in contrast with the national interest and that of other Regions:

Organization of the offices and the administrative bodies dependent on the Region;
Town boundaries;
Urban and rural local police;
Fairs and markets;
Public charities and health and hospital assistance;
Professional and craft training and scholastic assistance;
Museums and libraries of local bodies;
Urban planning;
Tourism and hotel industry;
Rail and bus services of regional interest;
Roads, acqueducts and public works of regional interest;
Lake navigation and ports;
Mineral and spa waters;
Quarries and peat bogs;
Hunting;
Fishing in internal waters;
Agriculture and forestry;
Artisanship;
Other matters indicated by constitutional laws;

The laws of Republic may delegate to the Region the power to issue norms for their implementation.

COSTITUZIONE [COST.] art. 117.

199. *Id.* art. 125.

200. *Id.* art. 126.

Whether environmental protection falls within one of the listed categories of article 117 determines whether the regions may have general legislative powers, albeit within the context of national framework laws, for environmental matters. Regions may have general legislative powers for matters not presently listed in article 117 only when it is amended by constitutional law. On the other hand, the last sentence of article 117 says that state laws may delegate legislative power to regions to provide for their implementation. Thus, for example, article 7, presidential decree law no. 616 of 1977, accords regions such legislative powers over the same matters for which it transfers them administrative jurisdiction.[201]

Moreover, after article 118 states that regions are to have administrative competence for the matters listed in article 117, it further provides that the state may delegate administrative responsibility for such other matters as it chooses to the regions.

In this situation, the precise constitutional basis for regional environmental protection action may be either that the state has elected to delegate to regions administrative action jurisdiction to protect the environment or that environmental protection is within regional legislative jurisdiction because it falls within one of the categories listed in article 117.

It is difficult to fit air pollution within one of the matters for which regions have legislative power pursuant to article 117.[202] The Constitutional Court's ample definition of environmental protection renders this effort yet more difficult. The Court has stated: "Environment protection includes . . . protection of the countryside, as well as the advancement of health and the defense of the earth, air and water from pollution."[203] This definition would seem to exclude environmental protection from all of the matters listed in article 117, except perhaps urban planning. Additionally, in the same decision, the Constitutional Court seems to deny that environmental protection can be included within the concept of urban planning.[204] At most, the Court seems to say, urban planning could be considered a limited part of

201. Presidential Decree Law no. 616 of July 24, 1977, Suppl. Ord. Gaz. Uff. no. 234 of Aug. 29, 1977, in implementation of the delegation of Law no. 382 of July 22, 1985, Gazzetta Ufficiale della Repubblica Italiana [Gaz. Uff.] no. 220 of Aug. 20, 1975.

202. For the complete text of Article 117, see *supra* note 198.

203. Judgment no. 239 of Dec. 29, 1982, Corte cost., 61 Raccolta ufficiale delle sentenze e ordinanze dell Corte costitutionale [Racc. uff. corte cost.] 489, 498 (1982), 27 Giurisprudenza Costituzionale [Giur. cost.] 2307 (1982).

204. *Id.*

environmental protection. The question which gave rise to the decision regarded the legitimacy of a regional law which prohibited development along coast lines. The constitutional question raised was whether the matter covered by the regional law fell within the subject matter of urban planning, a subject matter of regional competence, or rather within the protection of the countryside, a state subject matter pursuant to article 9 of the Constitution. The Court found that urban planning included regulation of development in both rural and urban areas.

In a 1972 decision,[205] the Court declared that the term "urban planning" must retain its original meaning as drafted into the Constitution by the Constituent Assembly. This view has been criticized on the ground that the Court drew the meaning of the concept of urban planning from a 1942 law, which does not clearly define the term.[206] A more important criticism is that it is a mistake to freeze constitutional interpretations to those of the Constituent Assembly.[207] At least one author, relying on an older decision by the Constitutional Court on another point,[208] has suggested that the better view is to interpret the text of the Constitution in light of the legislation currently in force. However, complete disregard of the Constituent Assembly would negate the guarantee function of the Constitution. Nevertheless, if the constitutional norms concerning regional powers are considered as programmatic norms for future legislation and constitutional jurisprudence rather than as guarantees of either regional autonomy or central supremacy, then reference to the legislation in force as an instrument of interpretation is justifiable.

The means adopted to implement the constitutional vision of regionalism reinforce this latter view. Presidential decree law no. 616/

205. Judgment no. 141 of July 24, 1972, Corte cost., 36 Racc. uff. corte cost. 263, 276-77, 17 Giur. cost. 1415, 1424 (1972).

206. Assini, *Urbanistica e tutela dell'ambiente nella giurisprudenza della Corte costituzionale*, 28 Giur. cost. 1056 (1983).

207. *Id.* at 1060-61. The Constituent Assembly drafted the post World War II Constitution.

208. *See id.* at 1061 (citing Judgment no. 66 of December 22, 1961, Corte cost., 12 Racc. uff. corte cost. 271, 6 Giur. cost. 1240 (1961)). However, this decision contains only the limited observation that "the formulae used in the Statutes [the charters of the Italian regions, which are considered of constitutional rank] must be interpreted according to the meaning that they have in common legislative language and in the legal order in force . . ." 12 Racc. uff. corte cost. at 278, 6 Giur. cost. at 1247-48. Although the regional statute to which the Court refers had constitutional rank, it is not possible to tell from the decision whether the Court meant to refer to the legal order in force at the moment of the issuance of the Statute or at the moment of the Statute's interpretion.

1977, the fundamental norm for implementing the constitutional provisions on regionalism, does not carefully follow the list set forth by article 117. Instead, it identifies four broad categories of matters transferred to the regions: administrative organization, social services, economic development, and land use.[209] Although these four broad categories generally cover the matters listed in article 117, the Parliament clearly did not feel obligated to follow article 117 literally.

Article 80 of presidential decree law no. 616/1977 includes environmental protection within its definition of urban planning.[210] To maintain that the article 80 definition of urban planning is limited to zoning is an artificial interpretation, counter to the actual transfer of jurisdiction to the regions.[211] The broad definition of urban planning in article 80 is in the context of the transfer of administrative jurisdiction to the regions. If this definition is at all persuasive in determining the meaning of urban planning for purposes of article 117 (that is, for identifying the jurisdictions constitutionally due to the regions), then it would seem that the regions should have legislative power for environmental matters. Although the constitutional model of regionalism permits national framework laws to set the bounds of regional legislation, the capacity of the regions to legislate within those limits in environmental matters would be a means of increasing their political responsibility.

To reach a result consistent with actual legislative and administrative practice is compatible with the role of the Constitutional Court in the Italian system. Italy is not a federal state formed by the union of sovereign states like the United States. On the contrary, it is a unitary and centralized state which is decentralizing itself. Consequently, the function of the Constitutional Court is not to support and reinforce the central power. Such a centralizing function may have been the role of the United States Supreme Court at one time, and may currently be the role of the Court of Justice of the European Communities. But in the unitary system, the role of the Constitutional Court should be to encourage a balanced development of regionalism. While the Court must encourage the development of regional autonomy, it should also encourage an effective central

209. Presidential Decree Law no. 616, art. 3.

210. *Id.* art. 80. Article 80 provides that "the administrative functions relative to the subject matter of 'urban planning' concern regulation of the use of territory including all cognitive, normative and managerial aspects of operations of safeguard and transformation of the land as well as protection of the environment." *Id.*

211. *See* Assini, *supra* note 206, at 1065.

power of direction, motivation, and, if necessary when faced with regional inertia, substitution for local authorities.

So far the Court's orientation on questions of central power has been encouraging. It has approved the adoption of procedural and methodological standards for regional activities in urban planning.[212] In so doing, it has recognized the central function of guidance and coordination. More recently, it has found that the central government retains important powers for environmental protection notwithstanding the extensive regional responsibilities for environmental protection. The Court affirmed that the State retains general residual powers for environmental protection, and that the constitutional obligation to protect the countryside applied to both the State and regions. The Court thus indicated its vision of regional autonomy as not absolute, but instead as limited by the power of the State to fill in the gaps left by local inertia and other shortcomings of regional action.[213] It remains to be seen, however, whether the Court would consider more invasive provisions adopted by Parliament or the Government as violating the constitutionally protected sphere of regional autonomy.

B. Italian Air Pollution Law

Despite the recent creation of the Ministry of Environment,[214] a ministry without portfolio and hence without significant staff, the Italian public administration system is not adequately organized to confront issues of environmental protection. At the central level the responsibilities for environmental protection are distributed among at least thirteen different ministries.[215] At the regional level there is a similar lack of coherent administrative organization.

Until recently there was no statutory basis for adequate central powers of intervention to control and stimulate the regional and communal public administrations. The recent law which established the Ministry of Environment could provide a basis to compensate for the regional and local inertia. This law permits the Ministry of Environment to substitute itself for the regions, the provinces and the com-

212. Judgment no. 141, Racc. uff. corte cost. at 283, 17 Giur. cost. at 283.

213. Judgments nos. 151, 152, 153 of June 27, 1986, Corte cost., Gazz. Uff., prima serie speciale no. 31 of July 2, 1986; Judgment no. 359 of December 21, 1985, Corte cost., Gazz. Uff., prima serie speciale, no. 1 of January 8, 1986.

214. Law no. 349 of July 8, 1986, Suppl. Ord. Gazz. Uff. no. 162 of July 15, 1986.

215. M. GUTTIERES & U. RUFFOLO, THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN ITALY 20-22 (2nd ed. 1982).

munes when they fail to implement or observe a provision of law concerning environmental protection if serious environmental damage could result.[216] Additionally, if the regional administration persistently fails to exercise an environmental function delegated by the State, the Ministry of Environment can require directly that the necessary action be taken.[217]

Even with the new substitutive powers of the Ministry of Environment, the problems of implementation at the regional and local levels remain. Existing legislation has not established administrative structures capable of confronting air pollution adequately. That is, in addition to the faulty conception of relations between central and local powers, there is a major lack of valid bureaucratic organization at all levels. This is due in part to the lack of political will to create such organization and in part to the lack of coordination between the various state laws.

The governing provisions on air pollution are three superimposed laws passed in 1934, 1966, and 1978. The texts providing for development of Italy's regions as autonomous administrative and political entities add another layer of complexity. It has been suggested that new legislation is desirable to clean up the interpretive mess, if for no other reason.[218]

European Community environmental legislation may provide the necessary stimulus to national legislative reform. Community environmental directives benefit Italy by providing the central establishment of standards missing at the national level.[219] For example, the directives fixing ambient air quality limits[220] set uniform goals and provide deadlines for compliance.

Community legislation stimulates national reform in ways difficult to quantify. Nevertheless, as a result of the need to integrate the Community directive on sulfur dioxide and particulates into national law, the Ministry of Health is directing an effort to draft, and eventually propose, a new, comprehensive air pollution control law.[221] An

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216. Law no. 349 of 1986, art. 8(3).

217. *Id.* art. 9(3).

218. Fuzio, *L'assetto delle competenze in materia di inquinamento atmosferico dopo il DPR no. 616 del 1977 e la legge di riforma sanitaria*, 16 GIURISPRUDENZA DI MERITO IV [GIUR. MERITO] 224, 226-27 (1984).

219. *See* B. DENTE & P. KNOEPFEL, *supra* note 19, at 202-03 (concurring in examples given).

220. *See infra* notes 354-367 and accompanying text.

221. F. GIAMPIETRO, *supra* note 195, at 269.

example of Community stimulus is the adoption of a national law to comply with the Community directive on sulfur content of fuel oil.[222]

Conclusions regarding the effects of Community environmental legislation on national legislation are tentative, however, because of Italy's slowness to implement Community directives in all subject matters. As an interim solution to the problem, a 1982 law[223] delegated to the government the power to receive into national law ninety seven directives issued from 1964 to 1980. The necessity of relying on such measures is due to the complexity of Italian politics which causes Community law issues to receive a lower priority than national political issues.[224] It may also be due to the low level of parliamentary involvement in the formulation of national input into the establishment of directives, as well as to some extent a deliberate political choice to go slow on implementation.[225]

The basic Italian scheme for regulating air pollution is not in itself terribly complex. In essence, air quality limits are centrally established, but industrial sources must seek operating permits from local mayors. The mayor must in turn seek a binding opinion from a regional advisory body, the *Comitato Regionale contro l'Inquinamento Atmosferico* (CRIA) (Regional Committee against Air Pollution) or its equivalent, on what controls to impose on the plant. Air pollution from space heating is controlled under a separate permitting system through comunes.[226] Fuel quality limits[227] and uniform standards for

222. M. GUTTIERES & U. RUFFOLO, *supra* note 215 at 49.

223. Law no. 42 of Feb. 9, 1982, Gaz. Uff. no. 55 of Feb. 25, 1982. The Community directives on lead in gasoline and on sulfur in gas oil, *see infra* notes 351-52, were among those implemented pursuant to this law. Presidential Decree Law no. 485 of May 10, 1982, Gaz. Uff. no. 208 of July 30, 1982; Presidential Decree Law no. 400 of June 8, 1982, Gaz. Uff. no. 181 of July 3, 1982.

224. One author has called the delay in implementing Community norms a reflection of political backwardness. Grassi, *Parlamento, Governo, Regioni e Attuazione delle direttive Comunitarie [nel D.D.L. governativo 7 Agosto 1982]*, 11 LE REGIONI 652, 652-53 n.3 (1983) (noting that over 100 proceedings were pending before the Court of Justice regarding Italy's delays in implementing Community directives).

225. *See* Tizzano, *La corte costituzionale e il diritto comunitario*, 107 Foro Italiano Corte cost. [Foro It.], I 2062, 2074 (1984); *see also* Cassese, *La regle et les derogations: Le systeme politico-administratif italien et les directives communautaires*, 1985 REVUE FRANCAISE D'ADMINISTRATION PUBLIQUE 265.

226. Presidential Decree Law no. 616, art. 104.

227. Presidential Decree Law no. 1391 of Dec. 22, 1970, art. 14 Suppl. Ord. Gaz. Uff. no. 59 of Mar. 8, 1971; Law no. 615 of July 13, 1966, arts. 8-19, Gaz. Uff. no. 201 of Aug. 13, 1966 (anticipated limits on fuel quality and a permitting program for combustion installations). These provisions were modified by Presidential Decree Law no. 400 of June 8, 1982, Gaz. Uff. no. 181 of July 3, 1982, in order to comply with the Community directive, 18 O.J. EUR. COMM. (No. L 307) 23 (1975), 75/716/EEC, on the sulfur content of gas oil. The directive

vehicles are centrally established.[228] Electric power plants are also centrally regulated.

1. 1934 health code

The oldest of the three laws treating air pollution is the 1934 *Testo Unico delle leggi sanitarie*.[229] As part of a general codification of public health law, this statute established a system of classified installations for regulating industrial pollution.[230] Under this law, the Minister of Health maintains a list of two categories of industry required to seek permits from mayors. First class industries are those which must be removed from areas of habitation unless a particular demonstration of safety is made. Second class industries are those which require special precautions for the health and safety of the neighborhood.

Mayors are responsible for licensing the industrial facilities located in their communes which fall within either of these two categories. In the thirties, mayors may have been competent to license the typical industries of the period. However, a mayor acting without bureaucratic support is incapable of determining under what conditions to license a modern industrial facility such as a refinery. Unfortunately, subsequent legislation on air pollution, although making some effort to bring technical expertise to bear on the licensing problem, has not constituted an effective substitute for the essentially personal role of the mayor.

The useful feature of this 1934 law is its provision for central establishment of industrial categories. Central classification of hazardous industries represents a significant economy of scale over a system in which each region would establish its own classifications. It also provides a basis on which national emission limits might be established by industrial category, although no such limits have been established.

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requires type A fuel to have 0.3% maximum sulfur content by 1980 and type B fuel to have 0.5% maximum sulfur content by 1980. The Italian law mandates the type A limit only in 1985 and the type B limit only in 1983.

228. *See infra* note 245.

229. *Testo Unico delle Leggi Sanitare* [TULS], arts. 216-17, approved by Royal Decree no. 1265 of July 27, 1934, Suppl. Ord. Gaz. Uff. no. 186 of Aug. 9, 1934.

230. *Id.*

2. 1966 air pollution control law

The second law on air pollution, Law no. 615 of July 13, 1966,[231] establishes a general framework for limiting emissions.[232] Although the law deals with all kinds of air pollution, the winter smog problems of northern Italy arising from domestic heating and the inversions typical of the area in winter were a particular motivation for the law.[233] This may help explain why the law's provisions on industrial pollution do not seem well thought out.[234]

The 1966 law does not repeal the law on classified installations just described.[235] The mayor apparently retains the powers granted under the 1934 law to block operation of polluting industrial facilities.[236] However, the 1966 law imposes on industry an additional general obligation not to increase ambient concentrations by applying emission controls within the strictest limits that technical progress permits.[237]

The law's 1971 implementing decree for industrial installations

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231. Law no. 615, of July 13, 1966, Gaz. Uff. no. 201 of Aug. 13, 1966.

232. However, electric power plants are treated separately: (1) by Law no. 880 of Dec. 18, 1973, Gaz. Uff. no. 6 of Jan. 7, 1974, which requires approval of construction plans by an interministerial committee, fixes special limits for electric power plant contributions to ambient sulfur dioxide concentrations and requires each electric power plant to have its own monitoring network, and (2) by Law no. 393 of Aug. 2, 1975, Gaz. Uff. no. 224 of Aug. 23, 1975, which involves the regions in the siting of nuclear power plants and permits government control of fuel choice and quality in fossil fuel power plants in response to fuel shortages.

233. B. DENTE & P. KNOEPFEL, *supra* note 19, at 63.

234. *Id.*

235. Law no. 615 of 1966, article 20 expressly provides for the continued existence of the older classified installation system established under article 216 of the TULS of 1934.

236. The continued effect of the 1934 law is still somewhat unsettled. The Council of State in 1972 said that the 1966 law superceeded the 1934 law whereas the Court of Cassation in 1974 and 1975 affirmed that the two laws could coexist. For review of this jurisprudence, see B. DENTE & P. KNOEPFEL, *supra* note 19, at 50-52 (citing Council of State, sez. II, Judgment no. 589 of Oct. 17, 1972, 96 Repertorio del Foro Italiano 2336, para. 79 (1973) (headnote only); Judgments of June 8, 1974 and May 24, 1975, (Corte cass. VI sez. pen., unpublished). Nonetheless, even administrative tribunals permit mayors to exercise authority under the 1934 law. For an example in which a mayor was held to have the power under the 1934 law to order the operator of an electric power plant to prove that it was not causing unhealthful emissions, see Barel, *Lavorazioni insalubri, impianti inquinanti e poteri del sindaco*, 8 LE REGIONI 205 (1980) (commenting on TAR Emilia-Romagna, Judgment no. 150 of May 22, 1979).

237. Law no. 615 of 1966, art. 20. In at least one case central authorities have intervened to define what such techniques are. The *circolare* (circular) of the Health Minister, no. 135 of Oct. 5, 1972, provides that chimneys are to be balanced against other means of reducing ambient concentrations in deciding what controls are to be employed by sources. Foraboschi, *Il Tecnico e la Normativa Contro l'Inquinamento Atmosferico d'Origine Industriale*, LA DISCIPLINA GIURIDICA DELLA PROTEZIONE CONTRO GLI INQUINAMENTI §§ 7-21, 15-16 (1980).

established ambient air concentration limits for eleven pollutants.[238] However, these values only apply in areas classified in one of two zones.[239] Cities in the center and north of Italy with more than 300,000 inhabitants and in the south of Italy with more than 1,000,000 are classified as zone B. Cities with populations of 70,000 to 300,000 in the center and north of Italy and with population of 300,000 to 1,000,000 in the south of Italy are classified as zone A. The minister of health may for good cause classify smaller cities into one of the two zones. Unless an area is classified into one of the two zones, the 1966 law does not apply to it. Instead, only the 1934 law on classified installations applies. This limited zoning scheme was an error caused by the failure to recognize, at the time of the law's enactment, that air pollution is not a local problem. In addition to not recognizing the nonlocal nature of air pollution, the zoning scheme skews the location of industry in a way that does not correspond to the severity of air pollution problems and fails to consider problems of nondegradation.

The 1971 values for ambient air quality were updated for the first time in 1983 (by a law described below). The new values will eventually apply throughout the national territory. If an industrial source would cause an increase in ambient concentrations beyond the established limit values, it would not be allowed to locate in a particular zone.[240]

The 1966 law creates regional technical committees, *Comitatis Regionali contro l'Inquinamento Atmosferico* (CRIA's), to instruct the mayor on what technical controls to require as a condition for issuance of an operating permit.[241] These committees are collegial bodies and have never been given extensive staffs. Their present organizational failings will be elaborated after full description of the major legislative texts.

Decrees implementing the 1966 law for combustion installations,[242] industrial installations,[243] and diesel vehicles[244] were issued at

238. Presidential Decree Law no. 322 of Apr. 15, 1971, art. 8, Supp. Ord. Gaz. Uff. no. 145 of June 9, 1971. The pollutants are sulfur dioxide, chlorine, hydrochloric acid, fluorine, hydrogen sulfide, hydrocarbons deriving from refineries, nitrogen oxides, carbon monoxide, lead, inert suspended particles, and silicon dioxide particles. *Id.*

239. Law no. 615 of 1966, art. 2, provides for the classification.

240. Presidential Decree Law no. 322 of 1971, art. 5.

241. Law no. 615 of 1966, art. 5.

242. Presidential Decree Law no. 1391 of Dec. 22, 1970, Supp. ord. Gaz. Uff. no. 59 of Mar. 8, 1971.

243. Presidential Decree Law no. 322 of 1971, *supra* note 238.

the beginning of the 1970s. Gasoline powered vehicles were treated by a separate law in 1971.[245] In 1973 a law dealing specially with Venice was enacted. It provided for a planning process to deal with pollution problems, required the use of natural gas for home heating, and reinforced the sanctions of the 1966 law for pollution in Venice.[246]

3. Presidential decree law no. 616 of 1977

The first general implementation of the regionalization provisions of Italy's Constitution[247] hindered orderly implementation of the existing air pollution laws. First, a 1972 reform maintained the state's jurisdiction for air pollution,[248] but gave the regions some administrative functions.[249] Then the presidential decree law no. 616 of 1977 completely reworked the division of responsibilities between the

244. Presidential Decree Law no. 323 of Feb. 22, 1971, Supp. Ord. Gaz. Uff. no. 145 of June 9, 1971.

245. Law no. 437 of June 3, 1971, Gaz. Uff. no. 169 of July 8, 1971, which receives the EEC directive of 20 Mar. 1970, 13 O.J. EUR. COMM. (No. L 159) (1970), (70/220/EEC), for gasoline powered cars. Also, Law no. 615 of 1966, article 22 gives the health minister in concert with four other ministers authority to issue decrees regulating emissions from internal combustion engines. Presidential Decree Law no. 323 of 1971, setting limits on the opacity of diesel engine exhaust emissions, was issued pursuant to this provision.

The EEC directive 290 of May 28, 1974 has been implemented by a Ministerial Decree of Mar. 7, 1975. Directive EEC/102/77 has not been implemented. This nonimplementation may have little consequence if Italian car producers manufacture to Community standards for export purposes. EEC directive EEC/306/1972 on diesels was implemented by Ministerial Decree of Aug. 5, 1974. Directive EEC/537/1977 appears not to have been implemented.

The composition of fuel for cars is controlled by the Ministry of Transportation on the basis of regulations under the Presidential Decree Law no. 420 of June 30, 1959. The directive 78/611/EEC on the lead content of gasoline has been belatedly implemented by the Presidential Decree Law no. 485 of May 10, 1982, Gaz. Uff. no. 208 of July 30, 1982, corrected in Gaz. Uff. no. 214 of Aug. 5, 1982. Although the implementing law was not adopted until 1982, the directive's 1981 deadline was voluntarily respected by gasoline producers. ISTITUTO DI STUDI E DOCUMENTAZIONE PER IL TERRITORIO (DOCTER), ANNUARIO EUROPEO DELL'AMBIENTE 73 (1984). Regarding Community vehicle directives, see *infra* note 346.

246. Law no. 171 of Apr. 16, 1973, Gaz. Uff. no. 117 of May 8, 1973. There are indications that as the result of industrial controls and the conversion of home heating from oil to gas, the severity of Venice's air pollution problem decreased between 1973 and 1979. ISTITUTO SUPERIORE DI SANITA AND COMMUNE E PROVINCIA DI VENEZIA, VOL. IV, RILEVAMENTO DI BIOSSIDO DI ZOLFO, DI OSSIDO DI AZOTO E DI PARTICELLE IN SOSPENSIONE NELL'ARIA NEL PERIODO FEBBRAIO 1976-DICEMBRE 1977, CONSIDERAZIONI CONCLUSIVE RELATIVE AL QUINQUENNIO DI INDAGINI (FEBBRAIO 1973-DICEMBRE 1977) 16.

247. COST. arts. 114-33.

248. Presidential Decree Law no. 4 of Jan. 14, 1972, art. 6(7), Supp. Ord. Gaz. Uff. no. 15 of Jan. 19, 1972, implementing Law no. 281 of May 16, 1970, Gaz. Uff. no. 127 of May 22, 1970.

249. *Id.* art. 13(8).

state and the regions.[250]

Article 101 of decree law no. 616 transferred administrative responsibility for air pollution, including the classified installation system, to the regions. Read together with articles 102(7) and 104 of the decree law, it reserved responsibility for controlling vehicular pollution to the state except that comunes are entitled to control emissions of vehicles. As a matter of fact, there are no controls on vehicle emissions apart from manufacturing specifications.[251] The existing laws on electric power plants,[252] which provide for a central role in their siting and operation, are expressly continued in force.[253] The state also reserved to itself research activity,[254] national level monitoring of air pollution,[255] and the setting of minimum emission and ambient air quality limits.[256] Because of the need for technical expertise and because of the greater central ability to resist locational pressures, the decree wisely reserved to central authorities the setting of minimum emission limits. It is noteworthy, however, that no effort to set industrial emission limits has been undertaken.

Other provisions of the decree indicate that the organizational consequences for air pollution control were not well thought out in its drafting. Provinces were given the responsibility for monitoring industrial emissions,[257] and comunes are given the responsibility for monitoring emissions from space heating.[258] Rather than assign the monitoring of industrial emissions to the provinces, as a matter of logic it would have been better to give monitoring responsibility to the body with de facto permitting authority, i.e. the regional CRIA. Likewise, it is illogical to distinguish the larger heating installations from industrial installations.

In any event, even prior to the 1977 organizational changes, little

250. *Supra* note 201.

251. Local efforts are limited to improving traffic flow. *See, e.g.*, PROVINCIA DI MODENA, RELAZIONE SULLO STATO DELL'AMBIENTE NELLA PROVINCIA DI MODENA 248 (1983).

252. Law no. 880 of Dec. 18, 1973, Gaz. Uff. no. 6 of Jan. 7, 1974; Law no. 393 of Aug. 2, 1975, Gaz. Uff. no. 393 of Aug. 23, 1975.

253. *Supra* note 201, at art. 81.

254. *Id.* art. 102(2).

255. *Id.* art. 102(3).

256. *Id.* art. 102(l).

257. *Id.* art. 104. This confirms the division of responsibilities established by Presidential Decree Law no. 322 of 1971, art. 6.1.

258. Presidential Decree Law no. 322 of 1971, art. 6.1, Decree Law no. 68 of Mar. 17, 1980, Gaz. Uff. no. 77 of Mar. 19, 1980, converted into law with modifications by Law no. 178 of May 16, 1980, Gaz. Uff. no. 134 of May 17, 1980, also provides that communes have the power to inspect heating installations to insure proper maintenance and operation.

had been done to establish the administrative and technical apparatus necessary to implement the existing 1966 law.[259]

4. Health care reform law of 1978

Finally, following the start of the administrative reorganizations, Law no. 833 of December 23, 1978,[260] was enacted to reform the health care system. Pollution problems were included as one of the many responsibilites of the local and national health care services created by the law. Because the 1978 law was intended to insure general protection of health, it is accepted that it does not annul any of the preexisting specialized legislation on pollution.[261]

The law gives the President of the Council of Ministers the power to fix by decree ambient air quality standards for chemical, physical, biological, and noise pollution in work and living environments and in the external environment.[262] These powers were exercised through a 1983 decree[263] which established new ambient air quality limits. The 1983 limits will replace those established in 1971 pursuant to the 1966 law,[264] as well as those established by particular laws for electric power plants.[265] The air quality limits set by the decree are to be met by 1993,[266] and efforts to meet these limits are not to lead to degradation of air quality.[267] Regions are to develop plans to achieve the required air quality within a maximum of ten years. In implementing the plans, the regions are to use the national health ser-

259. *See* F. GIAMPIETRO, *supra* note 195, at 29. Another Italian magistrate has written, *[L]a c.d. legge antismog del 1966 ha dato risultati molto scarse sia per la frammentarieta delle competenze sia per le carenze di una adaguata struttura sia per la mancata previsione di un impegno finanziario sia, infine per una totale assenza di una visione globale del fenomeno.* (The so-called 1966 antismog law has yielded scarce results because of the fragmentation of competences, the lack of an adequate structure, the lack of financial resources, and finally the total absence of a comprehensive vision of the phenomenon.)

G. AMENDOLA, LA NORMATIVA AMBIENTALE NEI PAESI DELLA COMUNITA EUROPEA 249 (1975).

260. Supp. Ord. Gaz. Uff. no. 360 of Dec. 28, 1978.

261. *See* F. GIAMPIETRO, INQUINAMENTI AMBIENTALI E LEGISLAZIONE DELLE REGIONI A STATUTO ORDINARIO, reprint from RICERCHE ISMERFO NO. 3.: AMBIENTE ECONOMIA REGIONI 276-77 (E. Fanara, ed. 1984).

262. Law no. 833 of 1978, art. 4; on proposition of the Minister of Health with an opinion of the Consiglio Sanitario Nazionale, an advisory body.

263. Decree no. 30 of Mar. 28, 1983, Supp. Ord. Gaz. Uff. no. 145 of May 28, 1983, *corrected by* Gaz. Uff. no. 206 of July 28, 1983, at 6065.

264. Presidential Decree Law no. 322 of 1971, annex to art. 8.

265. Law no. 880 of 1973, art. 6; Law no. 393 of 1975, arts. 8-9.

266. Supra note 263, at art. 3.

267. *Id.*

vice and the competent state technical agencies.[268]

This decree is a positive contribution to air pollution control. In addition to updating the ambient air quality limits, it makes them applicable throughout the national territory. It also introduces the principle of nondegradation into Italian air pollution control policy. The decree's chief insufficiencies are that it says nothing about who is to be responsible for taking action and that it fails to adequately specify the kinds of action to be taken. By failing to assign specific duties to the regional CRIA's or to the new bodies created by the 1978 law, it leaves the problem of creating effective bureaucracies in limbo. Accordingly, the decree's direction that regions are to develop air pollution control plans is largely hollow, especially in light of the fact that it fixes no consequences should no plans or inadequate plans be developed.

The problem of coordinating the 1978 health law with previous legislation is serious in that the 1978 law creates entities which might be seen as competing with the CRIA's.[269] The 1978 law establishes the *unita sanitaria locale* (USL) (local health unit) as the primary local administrative unit for health care. The duties of the USL include the identification and control of factors of harm, danger, and deterioration in work and living environments; indication of measures to eliminate risk in work and living environments; and verification of compatibility of industrial siting with zoning.[270] Notwithstanding the creation of the USL's, the mayor remains the local public health authority.[271] Thus permit demands are still to be made to the mayor, although there are those who argue that the USL's should assume this responsibility.[272] The statute anticipates that regional laws will designate certain USL's as multizonal headquarters for environmental problems.[273]

Some efforts along these lines have been made. For example, a regional law of Emilia-Romagna provides that the multizonal headquarters are to provide technical support activities to local govern-

268. *Id.*

269. *See* Mantero, *La tutela dell'ambiente dagli inquinamenti: Una materia tra stato, regioni e enti locali*, 1981 DIRITTO E SOCIETA 195, 201 (illustrating the uncertainty of finding a coherent interpretation of the 1978 health care reform law and the 1977 presidential decree law on regionalization).

270. Law no. 833 of 1978, arts. 14, 20.

271. *Id.* art. 13.

272. Fuzio, *supra* note 218.

273. Law no. 833 of 1978, art. 22.

ment units for environmental matters.[274] The details of these activities are to be governed by agreements negotiated between local governments and the multizonal headquarters.[275] Within the multizonal headquarters, there is to be a specific section with responsibility for air pollution.[276] There is also to be an interdisciplinary working group on air pollution.[277] The regional law is a sound one in that it provides for bureaucratic structures rather than massive committees. However, it does not speak to the relation between the regional CRIA and the structures created by the 1978 law on health care reform. A law of Toscana is even less definitive. As part of a reshaping of the membership of its CRIA, it says that the CRIA may "also" rely on USL's to accomplish its work.[278]

One function which might appropriately be assigned to a multizonal headquarters would be the formality of receiving permit applications. Alternatively, they could be designated as the authorities to act on the merits of permit applications. However, to substitute these multizonal headquarters for the regional permitting authorities altogether would not be advisable. The populations included in USL's are to be from 50,000 to 200,000 people, although larger USL's are possible for the major cities.[279] Even though the multizonal headquarters serve substantial populations, they are still too small and have too many other health care responsibilities to assemble the necessary engineering skills to evaluate air pollution permit applications. The present superposition of legislative texts does not clearly spell out the division of duties between the health care bodies and the regional committees created under the 1966 law (the CRIA's). To prevent each kind of body from asserting that responsibility belongs to other authorities, a central effort to define their roles should be made as part of the effort to develop effective working bureaucracies.

5. Permitting process

To more fully understand the functioning of the three substantive laws—the 1934 TULS, the 1966 anti-smog law, and the 1978 national

274. Regional Law no. 33 of Emilia-Romagna of Sept. 7, 1981, art. 2, Bulletino Ufficiale [BU] no. 10 of Sept. 9, 1981 (regions have their own official reporters, the respective Bulletino Ufficiale).

275. *Id.*

276. *Id.* art. 4.

277. *Id.* art. 6.

278. Regional Law no. 70 of Toscana of Aug. 24, 1982, art. 2, BU no. 49 of Aug. 31, 1982.

279. Law no. 833 of 1978, art. 14.

health law, it is helpful to analyze in detail the responsibilities of the established authorities who issue permits.

The initial request for a pollution permit is to be made to the mayor at the time a building permit is sought for a new plant or for modification of an existing plant.[280] The applicant is to present a detailed technical report on the industrial facility and the air pollution associated with it, which the mayor transmits to the CRIA.[281] The CRIA then has sixty days to act on the permit.[282] Before operation of the industrial installation, an additional authorization is required from the mayor.[283] The 1966 law and its implementing regulation require the mayor to include the CRIA conditions in a permit.[284] However, the mayor also has independent power under the 1934 legislation to refuse to grant a permit, to place additional conditions on it, or to take the necessary measures when no permit at all has been sought.[285] This power is potentially useful in the face of the CRIA's frequent passivity in imposing control requirements.

The mayor has not been a very effective figure in compensating for the inactivity of the CRIA for primarily two reasons. First, the mayor ordinarily has no technical expertise available to make complex engineering judgments. Secondly, in practice, the mayor is ordinarily afraid that a strong stand will direct jobs to other locations.

The regional CRIA's have also been poor decision makers. They suffer from the same inertia as the mayor, although they have on occasion responded reasonably well to particular problems which have attracted public attention.[286] Their problems have been threefold. First, the division of responsibility for making decisions on particular permits is badly distributed between central and regional authorities. Second, the structure of CRIA's themselves is mistaken. Finally, cen-

280. Presidential Decree Law no. 322 of 1971, art. 5.

281. *Id.*

282. *Id.*

283. *Id.* art. 5.4.

284. Although the statute is unclear (art. 6(b)), Presidential Decree Law no. 322 of 1971, article 5.3, confirms that the CRIA's opinion is binding on the mayor.

285. TULS of 1934, art. 217, Law no. 615 of 1966, art. 20.

286. *See, e.g.*, Palmonari, *Il caso sassuolo - L'inquinamento atmosferico ed i provvedimenti di prevenzione*, LA DISCIPLINA GIURIDICA DELLA PROTEZIONE CONTRO GLI INQUINAMENTI: ATTI DEL CONVEGNO NAZIONALE TENUTO A BOLOGNA IL 18-19 APRILE 1980 113-25 (1980) (describing the response to the lead, fluorine, and particulate pollution coming from a concentration in a small area of Emilia Romagna of 270 ceramic factories responsible for about 30% of the world production).

tral authorities have been unable to require commitment of resources to CRIA's.

CRIA's are collegial bodies. CRIA's were originally to consist of regional level functionaries, all of whom had significant other responsibilities.[287] Assigning government officials with other full time responsibilities to a committee may not be a bad idea when broad-based policy decisions are required. However, such an assignment is most unwise when the position mandates detailed decisions requiring substantial engineering expertise. The system as originally envisaged by the 1966 law might have worked if the CRIA's had been given a competent staff to actually prepare permits. However, no substantial staff was ever assigned to them during their period as state bodies.

The post war political theory of pluralism, laudable in itself, together with the fascist ideas on corporatism have led to an unfortunate excessive reliance on collegial decision-making in Italy.[288] In practice, collegial bodies may be simple advisory bodies, or they may have substantive decision-making powers. They may be entrusted with the decision of policy matters or with the resolution of technical matters. The individuals composing those bodies may be bureaucrats or representatives of interest groups.

Appointment of members of collegial bodies as interest group representatives, the exaggerated size of some of these bodies, and their use for routine technical decisions together work to minimize any deliberative benefits of collegial decision-making.[289] Other justifications advanced for collegial bodies are that they permit simplification of complex procedures and ensure coherent decisions by concentrating disjointed groups and authorities. Proponents assert that collegial bodies provide more effective representation of group interests. They are even considered to improve data collection capabilities.[290]

It has been a mistake to entrust collegial groups of bureaucratic officials with the responsibility for technical decisions. Responsibility

287. Law no. 615 of 1966, article 5, states that CRIA's were to consist of the following eleven people: the president of the region, the chief health officer of the region, the chief provincial medical officer of the province of the capital of the region, the regional official for public works, the local head of highway services, the director of the provincial chemical laboratory of the province of the region's capital city, a meteorological expert, the head of the regional occupational safety inspectorate, a representative of the provinces of the region, and a representative of the Chamber of Commerce of the capital city of the region together with an expert of his choice.

288. *See generally* M. CAMMELLI, L'AMMINISTRAZIONE PER COLLEGI (1980).

289. *Id.*

290. *Id.* at 77-78.

for making decisions is excessively diffused, and the existence of a collegial body is used as an excuse to avoid creation of a bureaucratic body with the resources necessary to make the required technical decision. In theory the practice of placing interest group representatives on collegial bodies might be considered a salutary direct application of the United States interest representation model.[291] However, making interest groups part of the deciding body rather than parties to which the deciding body must react (under threat of judicial invalidation of the decision if it does not) leads to paralysis of decision-making, interest group capture, or decisions made without adequate bureaucratic preparation.[292]

The CRIA system in Italy might be somewhat more functional if central authorities took some role in fixing emission standards by the category of the industry. In such cases, the mayor or the local CRIA would have a fixed set of criteria to impose in granting a permit. As it is, the central role is limited to fixing air quality limits. The translation of air quality limits into specific emission limitations or control technologies is quite difficult for two reasons: first, the complexities of assessing the impacts of specific emissions on air quality levels,[293] and second, the degree of engineering knowledge required. The Minister of Health has the authority to give instructions on measurement methods and maximum emission levels.[294] However, it has not been exercised.

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291. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1679-81 (1975); S. BREYER, REGULATION AND ITS REFORM 378-81 (1982); O'Brien, *The Courts and Science Policy Disputes: A Review and Commentary on the Role of the Judiciary in Regulatory Politics*, 4 J. ENERGY L. & POL'Y 81 (1983); Marcel, *The Role of the Courts in A Legislative and Administrative Legal System—The Use of Hard Look Review in Federal Environmental Litigation*, 62 OR. L. REV. 403 (1983).

292. These problems of collegial decision-making are not unique to Italy. To a much lesser extent, air pollution control policies at the state level in the United States have suffered similar problems. One case study of environmental programs in nine states concluded that the use of administrative structures to diffuse political accountability is one of the main problems in environmental policy. E. HASKELL & V. PRICE, *supra* note 84 at 243. The study not only argues for greater legislative oversight of administrative activities, but also criticizes existing structures. Single leaders with responsibility are preferred over appointive boards because single leaders are more accountable. *Id. But see* S. BREYER, *supra* note 291, at 354-56 (saying that whether an agency is headed by a multi-member board or a single chief appears irrelevant to the making of major changes in substantive agency policy at the federal level).

293. *Accord*, B. DENTE & P. KNOEPFEL, *supra* note 19, at 185. Predicting the ambient concentrations associated with emissions from particular sources is not an easy task. *See* PROJECT SUMMARY, CASE STUDIES IN THE APPLICATION OF AIR QUALITY MODELING IN ENVIRONMENTAL DECISIONMAKING, EPA 600/5481-034, (1981).

294. Presidential Decree Law no. 322 of 1971, art. 11.2, as preserved by Presidential Decree Law no. 616 of 1977, art. 102(1).

C. Regional activity

1. Regional legislation

The legislative provision which made CRIA's regional bodies also authorized the regions to legislate on their composition and to broaden their functions to other pollution problems.[295] This extremely lukewarm invitation to regional legislation is symptomatic of the improper conceptual approach to regionalism within the subject of air pollution control. Instead of a bland authorization to act, the decree should have established certain standards in terms of personnel and technical competence which the regions would be obliged to achieve in whatever way they saw fit. A simple authorization is an acquiescence to inertia.

Regional legislation has modified the compositions of CRIA's and broadened their functions to other kinds of environmental problems.[296] Sicily,[297] Toscana,[298] Lazio,[299] Veneto,[300] Liguria,[301] Umbria,[302] and Emilia-Romagna[303] have modified the compositions of CRIA's or added other kinds of pollution problems

295. Presidential Decree Law no. 616 of 1977, art. 101, final clause. No provisions were made for their funding.

296. *See generally*, Lewanski, *Nuove tendenze regionali nel settore dell'inquinamento atmosferico: La recente normativa dell'Emilia-Romagna*, 10 LE REGIONI 53 (1982).

Regional legislation has been published in regional official bulletins, which are not widely available and on occasion either incomplete or poorly indexed. A recent law requires that henceforth regional legislation also be published in the national Gazzetta Ufficiale. Law no. 839 of Dec. 11, 1984, art. 3, Gaz. Uff. no. 345 of Dec. 17, 1984. This will make subsequent regional legislation easier to find.

297. Regional Law no. 39 of Sicilia of June 18, 1977, arts. 3-4, Gaz. Uff. Sicilia no. 27 of June 21, 1977, modified by Regional Law no. 78 of Sicilia of Aug. 4, 1980, Gaz. Uff. Sicilia no. 36 of Aug. 9, 1980.

298. Regional Law no. 70 of Toscana of Aug. 24, 1982, BU no. 49 of Aug. 31, 1982 (giving a 19 member committee responsibility for air and noise pollution, but making no provision for staff).

299. Regional Law no. 50 of Lazio of June 29, 1979, BU no. 19 of July 10, 1979 (establishes a regional CRIA consisting of eleven members; its technical secretariat consists of employees in the central office of the regional government).

300. Regional Law no. 28 of Veneto of Apr. 11, 1980, BU no. 23, ediz. straordinaria, of Apr. 16, 1980.

301. Regional Law no. 20 of Liguria of Mar. 24, 1980, BU no. 14, supp. no. 2, of Apr. 2, 1980. This law makes the regional government responsible for authorizing the content of pollution permits given by mayors. *Id.* arts. 4(d), 15. The regional government is advised by the *comitato tecnico per l'ambiente*, a modified version of the old CRIA. *Id.* art. 5.

302. Regional Law no. 72 of Umbria of Dec. 10, 1980, BU no. 72 of Dec. 17, 1980 (creates *Consiglio tecnico regionale per la sanita* (Regional Technical Council for Health) and assigns functions of CRIA to it along with other health care duties. The *Consiglio* has 47 members, but there is a special section for air pollution consisting of five members of which four are public officials and one is an industry representative).

to their jurisdiction. Unfortunately, these reorganizations of the CRIA's have not generally involved assigning to them a staff which would prepare individual permit requirements. Instead, the CRIA's remain excessively large collegial bodies without a particular individual or specific staff designated as responsible for overseeing permit applications and ensuring that sensible requirements are imposed.

The regional law of Emilia Romagna[304] is typical. Its CRIA is to consist of the chief regional official for environmental affairs, two regional employees with experience in environmental protection, one public health expert, two experts in industrial installations, one chemist, one meteorologist, one acoustical expert, one expert from a university, three other experts, three experts chosen by the regional government from a list proposed by management organizations, an agronomist chosen from a list submitted by a farmers' association, an expert chosen from a union list, and experts representing local monitoring networks. To the extent that other regional bureaucracies are affected, their representatives may participate. It is difficult to conceive how twenty or more people as part of a collegial body can in any meaningful way pass on the content of a technical engineering assessment.

Nevertheless, regional legislation has made some positive contributions. In the early 1970s,[305] Lombardia, Emilia Romagna, Toscana, and Puglia funded measuring networks.[306] At the beginning of the eighties, Liguria and Emilia Romagna adopted regional laws applying the preexisting national air pollution controls to all industrial installations, whether or not they were located in the larger communes to which the applicability of the 1966 law was limited.[307] This action corrected one of the obvious flaws of the national legislation.

303. Regional Law no. 21 of Emilia-Romagna of Aug. 17, 1981, BU no. 96 of Aug. 18, 1981.

304. *Id.* art. 4. Sicily's air pollution laws follow a similar pattern. Regional Law no. 39 of Sicilia of June 18, 1977, arts. 3-4, Gaz. Uff. Sicilia no. 27 of June 21, 1977, modified by Regional Law no. 78 of Sicilia of Aug. 4, 1980, Gaz. Uff. Sicilia no. 36 of Aug. 9, 1980.

305. F. GIAMPIETRO, *supra* note 261 at 310-12, (collection of some of this information).

306. Regional Law no. 49 of Lombardia of Aug. 23, 1974, BU no. 35, supp., of Aug. 28, 1974; Regional Law no. 19 of Emilia-Romagna of Mar. 24, 1975, BU no. 45 of Mar. 26, 1975; Regional Law no. 21 of Toscana of May 27, 1974, BU no. 24 of June 5, 1974 (authorization to take out 800 million lira loan for financing monitoring networks); Regional Law no. 42 of Puglia of May 21, 1975, BU no. 20, edizione straordinaria, of May 28, 1975. Piedmont provided for the creation of a monitoring network in 1978. Regional Law no. 52 of Aug. 21, 1978, BU no. 35 of Aug. 29, 1978 (also adding four members to the CRIA).

307. Regional Law no. 20 of Liguria, arts. 13, 14; Regional Law no. 21 of Emilia-Romagna of Aug. 17, 1981, art. 2.

Finally, the provinces of Trentino and Bolzano, which as part of the special statute region of Trentino-Alto Adige benefit from special guarantees of autonomy, have each established complete air pollution control programs including generalized emission limits and bureaucratic support.[308]

In the end the regional legislative activity on air pollution may be like the bulk of regional legislative activity, which deals with trivialities of administrative organization or with authorizations of particular expenditures.[309] The regional laws just mentioned in fact raise strong suspicions that they amount to little more than a reshuffling of organization charts, rather than a real start towards efficient bureaucratic activity. The CRIA's lack of administrative resources is a lack of financing and a lack of technical personnel. The ability of the regions to resolve the financing problem is limited because most of the regions' budgets comes from precommitted state transfers.[310] This is true despite the constitutional intent that the regions have financial as well as political autonomy.[311] To remedy the financial problem, either the magnitude of unconstrained regional funds will have to be increased, or alternatively, some initiative at the central level to guide

308. Trentino created the Dipartimento Ecologico Provinciale by the provincial Law no. 59 of Nov. 29, 1973, BU no. 53 of Dec. 11, 1973, and then by the provincial Law no. 47 of Nov. 18, 1978, BU no. 60, suppl. ord. no. 1, of Nov. 28, 1978, established emission limits for all stationary sources and a *Servizio di Protezione dell'Ambiente* (Agency for the Protection of the Environment) to apply them. This service, which has responsibility for water pollution as well as air pollution, is to undertake monitoring activity and maintain an inventory of pollution sources. A commission of six technicians and public officials is to direct the service's activities with respect to air pollution. The provincial legislation was updated without changing its basic orientation by laws no. 18 of June 20, 1980, BU no. 33 of June 24, 1980 (updating the emission limits and altering the composition of the dipartimento ecologico provinciale) and no. 1 of Jan. 11, 1982, BU no. 4 of Jan. 19, 1982 (making technical adjustments); *see* also decree of the president of the provincial government of Trento no. 6-68 of Feb. 22, 1982, BU no. 16 of Apr. 13, 1982 (implementing regulations).

The laws for Bolzano are provincial Law no. 13 of June 4, 1973, BU no. 7 of Feb. 6, 1973, modified by provincial Law no. 46 of Sept. 13, 1973, BU no. 45 of Oct. 16, 1973.

309. *See* Bartole, *Il caso italiano*, 1984 LE REGIONI 411, 418, stating that:

> *La qualita della legislazione regionale non e molto alta e si tratta spesso di leggine concernenti minuti aspetti dell'amministrazione regionale, o di leggi di spesa, le quali in ogni caso sono state le grande risorse dei legislatori locali in difetto di iniziative piu impegnative di riordino delle materie regionali.* (The quality of regional legislation is not very high, and often it consists of little laws concerning miniscule aspects of regional administration, or of appropriation laws, which in any event have been the great refuge of local legislators in the absence of more substantial initiatives directed towards reordering regional matters.)

Id.

310. *Id.* at 423.

311. COST. art. 119.

funds into the CRIA's will be required. Such an initiative could be in the context of a framework law requiring the development of a certain level of regional bureaucratic proficiency in the issuance and nonissuance of permits relating to pollution. Such a law could also treat the problem of technical personnel. Still, the personnel problem is ultimately a regional one because the central authorities are completely lacking both in the resources to enforce standards directly and in the ability to recruit qualified technicians.

2. A sampling of regional bureaucratic activity

Italian central government administrative officials do not have a good grasp of what the regions have actually done from a practical, as opposed to a legislative, point of view with respect to air pollution control.[312] The one empirical study undertaken of regional administrative activity in the field of air pollution control[313] reveals that regions have adopted significantly different strategies of activity and that the effective central establishment of minimum standards of activity would prove useful.

The three regions studied were Emilia Romagna, Lombardia, and Piemonte. This study found that the central government was absent from air pollution control activity.[314] The governmental levels active were the communes and the regions. During the late 1970's, the CRIA's of these three regions had staffs of nine, twenty two, and three functionaries, respectively. The professional background of the nine Emilia Romagna functionaries was predominantly meteorology, and Emilia Romagna gave priority in its administrative activity to the establishment of monitoring networks. In Lombardia, where the dominant professional background of the staff was engineering, priority was given to control of emissions. In Piemonte, with its small staff, there was little activity. Of nine communes investigated in these three regions, four (Torino, Piacenza, Bologna, and Sesto San Giovanni) spontaneously created bureaucratic structures of from one to eighteen people to engage in air pollution control activity.

In light of the study's finding that efforts to control industrial air pollution emissions have been largely ineffective,[315] the question of

312. Author's personal conversations with Italian officials. This situation may change as a result of the law creating the Ministry of Environment. For text, see report of Senate session of May 8, 1986.

313. *See* B. DENTE & P. KNOEPFEL, *supra* note 19; B. DENTE, *supra* note 6.

314. The conclusions of the study are summarized in B. DENTE, *supra* note 6 at 191-95.

315. B. DENTE & P. KNOEPFEL, *supra* note 19 at 165.

why these regional and municipal efforts are insufficient must be addressed. The insufficiency of local efforts, together with the extreme variance in the level of regional efforts, supports the need to have stronger central intervention to ensure a minimum level of regional activity. On the local level, the study found that even though Torino had a staff of eighteen, far above that of other cities,[316] it did not have sufficient power to strongly regulate local industry.[317] Further, Torino was unable to amass sufficient expertise to confront the technical questions involved.[318]

With respect to the three regions studied, only Lombardia appears to have undertaken significant substantive activity. The study characterizes Emilia Romagna's monitoring activity as having largely symbolic rather than substantive value.[319] Although the regions have neither acted effectively to manage the air pollution problem nor provoked central intervention to strengthen their position, it would appear that they are beginning to recognize the inadequacy of the status quo. An effort by the regions themselves to agree on emission standards[320] demonstrates their desire for some form of uniform minimum standards.

3. Italian regionalism and Community law

Under the presidential decree law no. 616 of 1977,[321] the basis for regional application of EEC directives is to be the national law adopting the directive into domestic law. The model adopted was the national framework laws which ought to have regulated regional activity within the fields constitutionally assigned to the regions.

One difficulty with this scheme is that quite frequently the Italian Parliament has not received a directive into national law, let alone identified regional responsibilities for the directive's implementation, within a reasonable time. The kind of crisis measures adopted to in-

316. *See id.* at 128.

317. For example, it was evidently agreed in 1966 in a meeting between the mayor of Torino and the head of Fiat, the leading local industry, that the comune would not in any way interfere with Fiat with respect to air pollution. B. DENTE & P. KNOEPFEL, *supra* note 19 at 138-39.

318. *Id.* at 179-80.

319. *Id.* at 161-62.

320. *Id.* at 121.

321. Presidential Decree Law no. 616 of 1977, art. 6, implementing the delegation of Law no. 382 of July 22, 1975, art. 1(5), Gaz. Uff. no. 220 of Aug. 20, 1975.

corporate directives into national law are evidence of this.[322]

Article 6 of the presidential decree Law no. 616 of 1977 expressly grants the central government the power to substitute itself for the regions if they do not implement Community law. The Constitutional Court has found this approach acceptable on the ground that the State has exclusive responsibility to ensure that international obligations are respected. In the Constitutional Court's view, implementation of Community law is an obligation deriving from adherence to the Community treaties and therefore a state responsibility which takes precedence over regional autonomy.[323] This precedence applies even to the special statute regions which otherwise benefit from special guarantees of autonomy under article 116 of the Constitution.[324]

If Community law were not involved, national central authorities might not have constitutional power to substitute themselves for local authorities in the face of local inaction. The power is potentially important, but pessimism about the prospects for its meaningful exercise is justified.[325] So far the central administration has not effectively intervened directly at the regional level, and there is no reason that the mere involvement of Community obligations would make a decisive difference.

D. Conclusion

In summary, under the present statutory system the central government of Italy has only minimal powers to regulate regional action and virtually no power to overcome regional and local inertia. Although the central government has the power to set minimum emission standards, it has never exercised it. Only in the area of air quality standards have the central authorities established minimum requirements to which the regional actions must conform. Although a step in the right direction, these standards establish only a formal minimum. To ensure that they are respected, the central government needs to establish emission standards for at least some categories of sources.

Moreover, with respect to the regions, the central government

322. Bassanini & Caretti, *Autonomie regionali e poteri comunitari*, 8 LE REGIONI 84, 101-02 (1980).

323. Judgment no. 182 of July 22, 1976, Corte cost., 47 Rac. Uff. 587, 596-97, 21 Giur. cost. 1138, 1145-46 (1976).

324. Judgment no. 86 of July 26, 1979, Corte cost., 53 Rac. Uff. 43, 48-49, 24 Giur. cost. 646, 650-51 (1979).

325. *See* B. DENTE & P. KNOEPFEL, *supra* note 19 at 204.

needs an effective power of substitution analogous to that of the United States EPA to substitute itself for states which are not adequately enforcing air pollution control limitations. Whether it will be possible for the Ministry of Environment, in reliance on the 1986 statute creating it, to have powers approximating the EPA is questionable. The lack of administrative resources and the absence of requirements that regional action plans be developed and presented to the ministry for approval undermine such power. In this vein, financial initiatives aimed at increasing the capacity of the regional bureaucracy devoted to air pollution control would be helpful. A concomitant approach would be to centrally require regional development of effective bureaucracies with the threat of central substitution if they are not developed.

Whatever tools are adopted as incentives for reforming the regional bureaucracies, the regional authorities with permitting responsibility need to be converted from interdisciplinary study seminars into true bureaucratic permitting organizations. Given that the initial central legislation favored the collegial decision-making approach on the mistaken theory that a variety of public officials would among themselves have the expertise to set air pollution permit requirements and out of a desire to avoid altering the balance of political influences over the administrative process,[326] a sufficiently bold central legislative reform in Italy seems unlikely.

Judicial activism and a sympathetic judicial reception of private damage actions may alleviate the inadequacies of the public administration.[327] Nevertheless, European Community legislation may offer greater prospects for reforming the structure of relations between local and central authorities.

VI. EUROPEAN ECONOMIC COMMUNITY

European Community air pollution law is an integral part of French and Italian law.[328] As already noted, Community air pollution law has not had any effect on the structure of the relationship

326. *Id.* at 184.

327. *See* Del Duca, *supra* note 9, at 374.

328. The European Court of Justice declared the supremacy of Community law in 1964. Case 6/64, Costa v. ENEL, 1964 ECR 585. In the early 1970s it asserted that EEC law has supremacy even over national constitutional law. Case 11/70, Internationale Handelsgesellschaft mbH v. fuhrund Vorratsstelle fur Getreide und Futtermittel, 1970 ECR 1125, 1134; case 4/73, Nold v. Commission, 1974 ECR 491, 507-08. The constitutional courts of Germany and Italy have had reservations about accepting Community supremacy with respect to

between central and local authorities in France because of the strong centralization there. In contrast, Community law has the potential to provide the impetus for centralization currently lacking in Italy's regional system.

Community environmental policy was initiated by the declaration of the member states' heads of state and government at the Paris summit in 1972.[329] Following this political consensus of 1972, the Commission developed an environmental action program to guide Community action. The Council of Ministers adopted it in 1973.[330] Two other plans have followed it.[331]

Articles 100 and 235 of the EEC treaty (Treaty of Rome) have been the legal foundation of the Community's environmental policy.[332] The so-called Single European Act[333] amended the Treaty of

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constitutional law, but with respect to ordinary law, the doctrine is not seriously questioned. *See* Hartley, *supra* note 165, at 224-46.

Article 177 of the EEC treaty establishes a procedure for a national court to refer a question of Community law to the Court of Justice for a preliminary ruling. This reference is obligatory for courts against which no judicial remedy is available under national law, i.e., courts of last resort. Through this procedure, barring uncooperativeness by national courts, the Court of Justice is the ultimate arbiter of Community law.

329. *See* Beraud, *Fondements juridiques du droit de l'environnement dans le traite de Rome*, 22 REVUE DU MARCHE COMMUN 35, 36-37 (1979); Moussis, *Le cadre juridique de la politique d'environnement*, 26 REVUE DU MARCHE COMMUN 67 (1983).

330. 16 O.J. EUR. COMM. (No. C 112) 1 (1973). The first action program established objectives and principles of EEC environmental policy and set priorities for a two year period. General principles of EEC environmental policy established by the first action program include recognition of the need for preventive action, that action should be at the appropriate level of government, and the responsibility of the polluter. *Id.* at 6-7. The polluter pays principle advanced by the Organization for Economic Co-Operation and Development (OECD) is accepted with the qualifications that special arrangements and transition periods may be permissible. *Id.* at 6. For exposition of the polluter pays principle and its consequences, see ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE POLLUTER PAYS PRINCIPLE: DEFINITION, ANALYSIS, IMPLEMENTATION (1975).

Lead, sulfur compounds, particulates, nitrogen oxides, carbon monoxide, and hydrocarbons among others were identified as pollutants to which priority was to be given in establishing criteria of harm and standardized measurement methods. 16 O.J. EUR. COMM. (No. C 112) 1, 8, 13 (1973). Water pollutants were however to be accorded priority for standard setting, although harmonization of vehicle specifications was also a priority. *Id* at 9.

331. 20 O.J. EUR. COMM. (No. C 139) 1 (1977) (second action plan); 26 O.J. EUR. COMM. (No. C 46) 1 (1983) (third action plan). The third action program anticipates continued Community efforts toward establishment of air quality standards. *Id.* at 10. It also anticipates establishment of emission standards "for certain sources." *Id.* It specifies that "[t]his would apply notably to large, fixed sources with high stacks which distribute pollutants over a wide radius." *Id.* Motor vehicles are to be a continuing concern. *Id.* Implementation of the directive establishing ambient air quality limits for sulfur dioxide and particulates, 23 O.J. EUR. COMM. (No. L 229) 30 (1980), is singled out as an important activity. 26 O.J. EUR. COMM. (No. C 46) 1, 2 (1983).

332. For an analysis of how various articles of the EEC Treaty might be used for environ-

Rome in a number of ways, including making more explicit its provision for a Community environmental policy. The Act was signed in February 1986 by representatives of all the member states, and has been ratified by each of the member states pursuant to Article 236 of the EEC Treaty. Because the Act has just come into force, the principal Community environmental legislation was adopted based upon articles 100 and 235.

Article 100 authorizes Community policy in fields involving the harmonization of laws, regulations, and administrative action affecting the establishment and functioning of the common market.[334] For example, the early Community legislation regulating motor vehicle emissions was based exclusively on article 100.[335] The Court of Justice, in a pair of cases condemning Italy for tardy implementation of directives on detergents and on sulfur content of fuel oil, has held that article 100 may be used as a basis for Community environmental legislation.[336] Because of the need to show effects on competition, article 100 alone might have been insufficient to motivate all Community environmental protection measures. Some of these measures seem to be much more directed to treating substantive environmental problems rather than to the goal of achieving uniform laws. For this reason article 235 has been a useful supplement to article 100.

Although article 189 of the EEC treaty limits Community institutions to the exercise of enumerated powers only, article 235 provides that by unanimous Council action additional powers may be exercised to achieve a Community objective. Article 2 of the Treaty provides that it is a Community objective "to promote throughout the

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mental protection, see E. GRABITZ & C. SASSE, COMPETENCE OF THE EUROPEAN COMMUNITIES FOR ENVIRONMENTAL POLICY: PROPOSAL FOR AN AMENDMENT TO THE TREATY OF ROME 24-31 (1977).

333. 19 BULL. EC(2) 7-10 (1986).

334. Limits to reliance on article 100 are that at least one member state must have some provisions in the field and that the national provisions must directly affect the establishment or functioning of the common market. Articles 101 and 102 concerning actual and potential distortions of competition could also in principle be relied on. However, distortion of competition is a difficult concept to define, and before a directive is issued, the Commission must consult the state involved.

335. Directive 70/157/EEC of Feb. 6, 1970, 3 O.J. EUR. COMM. (special English ed.) (No. L 42 at 16) 111 (1970); directive 70/220/EEC of 20 March 1970, 3 O.J. EUR. COMM. (special English ed.) (No. L 76 at 1) 171 (1970) (specifically referring to the need to preempt French and German regulations of vehicle emissions in order to avoid impediments to the functioning of the common market).

336. EEC Commission v. Italy (Detergents), 1980 ECR 1099, 1106; EEC Commission v. Italy (maximum sulphur content of liquid fuels), 1980 ECR 1115, 1122.

Community a harmonious development of economic activities, a continuous and balanced expansion." When the Council approved the first environmental action program in 1973, it determined that this language included environmental protection.[337] Although the Court of Justice has not had occasion to rule on this point, it is now generally accepted that protection of health and the environment and sound management of natural resources are valid motivations for Community policy.[338]

The principal legal acts authorized by article 189 are Community directives and regulations. Both are to be proposed by the Commission and approved by the Council. Regulations are meant to apply to member states and individuals without the need for further administrative or legislative elaboration. Directives ordinarily require national administrative and legislative implementation. The goals contained in them are binding, but member states have discretion in how to achieve those goals.

The total number of directives of all kinds in force has grown from less than twenty-eight prior to 1970, to more than seven hundred in 1980.[339] Seventy pieces of Community environmental legislation, principally in the form of directives, were enacted between 1973 and 1982.[340] Implementation of directives in national law and practice is a major problem.[341] There has been a natural tendency for the Commission to focus on formal compliance with a directive, i.e.

337. 16 O.J. EUR. COMM. (No. C 112) 1, 5 (1973).

338. *See* Third Environmental Action Program, point 9, 26 O.J. EUR. COMM. (No. C 46) 1, 5 (1983) ("The ultimate objectives of environment policy are the protection of human health, the long-term availability of all the resources which determine the quality of life, of adequate quality and in sufficient quantity, namely, water, air, space—from both the land-use and landscape points of view—climate, raw materials, the built environment, and the natural and cultural heritage, as well as the maintenance and, where possible, the restoration of the natural environment with suitable habitats for flora and fauna."); *id.* point 15 at 8 ("It is first of all essential to combat the deterioration of the environment by reducing pollution and nuisances, in order to develop sound management of natural resources and to protect human beings.").

339. J. WEILER, SUPRANATIONAL LAW AND THE SUPRANATIONAL SYSTEM: LEGAL STRUCTURE AND POLITICAL PROCESS IN THE EUROPEAN COMMUNITY, Doctoral thesis defended at the European University Institute, June 1982, at 420 (revised version published as IL SISTEMA COMUNITARIO EUROPEO (1985)). Weiler's figure of only 28 directives in force in 1970 comes from R. PRYCE, THE POLITICS OF THE EUROPEAN COMMUNITY 59 (1973).

340. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITY, THE EUROPEAN COMMUNITY'S ENVIRONMENTAL POLICY 27 (2d ed. 1984), European Documentation Series no. 1/1984. For a systematic listing of Community environmental legislation with brief summaries of content, see P. BIANCHI & G. CORDINI, COMUNITA EUROPEA E PROTEZIONE DELL'AMBIENTE (1983).

341. *See* von Moltke & Haigh, *Major Issues for 1981*, 7 Envtl. Pol'y & L. 23, 28, 30 (1981).

whether a member state has enacted laws receiving the directive into national law. It is generally difficult to find empirical data of any kind on member states' compliance with the substance of the directives.[342] The most readily available information regards the proceedings against member states instituted by the Commission before the Court of Justice for infractions of directives.[343] But again, these proceedings regard formal compliance, not actual implementation. Because of the diversity in member state legal and administrative systems, comparative studies of compliance are complex. The Commission is reluctant to release its information because of the political sensitivity of noncompliance. Compliance varies from member state to member state. For example, Italy has been condemned forty six times by the Court of Justice for noncompliance with directives; whereas, the next most often condemned countries, France and Belgium, were each only condemned seven times.[344] Factors affecting national compliance with directives include the institutional mechanisms for implementing directives in national law, the stability of national governments, and the efficiency of national public administrations.[345]

A. Overview of EEC Air Pollution Law

Community air pollution legislation regulates vehicle emissions,[346] ambient concentrations of sulfur dioxide and particulates,[347]

342. Two of the few documents dealing with the reality of environmental policy implementation are: COMMISSION DES COMMUNAUTES EUROPEENES L'ETAT DE L' ENVIRONNEMENT: DEUXIEME RAPPORT 1979 (1979); COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, PROGRESS MADE IN IMPLEMENTING THE ENVIRONMENT ACTION PROGRAMME AND AN ASSESSMENT OF THE WORK DONE TO IMPLEMENT IT (1980) COM(80)222.

343. For recent statistics, see Azzi, *L'Application du droit communautaire dans les etats membres: Une vue d'ensemble*, 1985 REVUE FRANCAISE D'ADMINISTRATION PUBLIQUE 191.

344. J. WEILER, *supra* note 339 at 458.

345. *See* Azzi, *supra* note 343 at 194-208.

346. Directive 70/156/EEC of Feb. 6, 1970, 3 O.J. EUR. COMM. (No. L 42 at 1) (Special English ed.) 96 (1970), as amended by Act of Accession (1972), 15 O.J. COMM. EUR. (No. L 73) 1, 115 (1972) (English translation in Treaties establishing the European Communities; Treaties amending these Treaties, Documents concerning the Accession 1171-72 (1973)); and Act of Accession (1979), 22 O.J. EUR. COMM. (No. L 291) 1, 108 (1979); Directive 70/220/EEC of Mar. 20, 1970, 3 O.J. EUR. COMM. (No. L 76 at 1) (Special English ed.) 171 (1970); Directive 72/306/EEC of Aug. 2, 1972, 5 O.J. EUR. COMM. (Special English ed.) (No. L 190 at 1) 889 (1972); Directive 74/290/EEC of May 28, 1974, 17 O.J. EUR. COMM. (No. L 159) 61 (1974); Directive 77/102/EEC of 30 Nov. 1976, 20 O.J. EUR. COMM. (No. L 32) 32 (1977); Directive 78/665 of July 14, 1978, 21 O.J. EUR. COMM. (No. L 223) 48 (1978); Directive 83/351/EEC of June 16, 1983, 26 O.J. EUR. COMM. (No. L 197) 1 (1983).

Negotiations for an agreement to further stiffen the standards are underway. *See* 18 BULL. EC (11) 60 point 2.11.112 (Jan. 1986); 18 BULL. EC (6) 5859 point 2.1.97 (Aug. 1985); 18 BULL. EC (3) 36 point 2.1.70 (June 1985). Two directives on diesel vehicles have been

ambient concentrations of lead,[348] ambient concentrations of nitrogen oxides,[349] and emissions from industrial plants.[350] It also sets standards for lead in gasoline[351] and sulfur in fuel oil.[352] The Commission has proposed legislation to limit emissions from large combustion plants, which include coal and oil power plants.[353]

B. The Ambient Air Quality Directives

The 1980 directive establishing minimum ambient air quality standards for sulfur dioxide and particulates was a fundamental development in Community policy.[354] The directive established "limit values" and "guide values." Limit values are to protect human health specifically.[355] Guide values are long term precautions for health and environment.[356] Values are established for sulfur dioxide in conjunction with particulates and for particulates separately. Before October 1982 member states were to submit to the Commission plans to bring into compliance by 1993 any regions which will exceed the values established by the directive after April 1, 1983.[357] All implementation measures must be reported to the Commission,[358] and states must establish monitoring networks and report violations of the standards.[359]

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proposed: 29 O.J. EUR. COMM. (No. C 174) (1986) (private vehicles); 29 O.J. EUR. COMM. (No. C 193) (1986) (commercial vehicles).

347. Directive 80/779/EEC of July 15, 1980, 23 O.J. EUR. COMM. (No. L 229) 30 (1980).

348. Council directive 82/884/EEC of Dec. 3, 1982, 25 O.J. EUR. COMM. (No. L 378) 15 (1982).

349. Directive of Mar. 7, 1985, 28 O.J. EUR. COMM. (No. L 87) 1 (1985).

350. Directive 84/360/EEC of June 28, 1984, 27 O.J. EUR. COMM. (No. L 188) 20 (1984).

351. Directive 78/611/EEC of June 29, 1978, 21 O.J. EUR. COMM. (No. L 197) 19 (1978).

352. Directive 75/716/EEC of Nov. 24, 1975, 18 O.J. EUR. COMM. (No. L 307) 23 (1975). A reinforcement of the standards set by this directive has been proposed. 28 O.J. EUR. COMM. (No. L 205) 3 (1985).

353. Proposed directive of Sept. 13, 1983, 26 O.J. EUR. COMM. (No. C 258) 3 (1983); Proposed directive of Dec. 19, 1983, 27 O.J. EUR. COMM. (No. C 49) 1 (1984). Deliberations on this directive are continuing. *See* 19 BULL. EC (6) 58 points 2.1.155-56 (Sept. 1986); 19 BULL. EC (3) 39-40 point 2.1.107 (1986).

354. O.J. EUR. COMM. (No. L 229) 30 (1980).

355. *Id.* art. 2.

356. *Id.*

357. *Id.* art. 3.

358. *Id.* art. 15.

359. *Id.* arts. 6-7. The first Council action specifically directed toward sulfur dioxide and particulates was to provide for exchange of information between surveillance and monitoring networks for sulfur dioxide and particulates. Council decision 75/441/EEC of June 24, 1975, 18 O.J. EUR. COMM. (No. L 194) 32 (1975). The 1975 decision has been updated by decision 82/459/EEC of June 24, 1982, 25 O.J. EUR. COMM. (No. L 210) 1 (1982) (monitoring program and information exchange for sulfur dioxide, suspended particulates, suspended particles of heavy metals, nitrogen oxides, carbon monoxide, and ozone). The article 5 preference of

The directive established alternative measurement techniques and permits use of other techniques if proved to produce equivalent results.[360] Finally, the laws, regulations, and administrative provisions necessary to implement the directive were to be brought into force within two years of the directive's effective date.[361] As of 1985, the Commission termed the progress made in implementing this directive as "anything but satisfactory."[362]

The directive on lead fixes limit values for concentrations of lead in the air, but permits member states to have more stringent requirements.[363] Member states had five years to comply with the directive's limit values, and were to submit plans to the Commission explaining how they will comply.[364]

The recent directive on nitrogen oxides fixes limit values which are not to be exceeded and guide values, which if exceeded, are to promote special attention by member states.[365] To attain the limit values in areas where they are exceeded "as rapidly as possible and by 1 January 1994 at the latest," plans are to be submitted to the Commission.[366] Member states may set more stringent values.[367]

C. Emission Standards

The recent directive on air pollution from industrial plants, adopted four years after the sulfur dioxide and particulate directive, has increased the likelihood of successfully attaining ambient air quality goals.[368] It does so chiefly by making Community emission standards for industrial sources a more realistic possibility.

The directive has two operative requirements. One is that member states require air pollution permits for industrial plants within categories listed by the directive which are authorized or modified after 1987.[369] The second is that these permits may be issued only when

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this decision for member state transmission of data to the Commission on magnetic tape evidences an increased sophistication towards the practical problems of air pollution control.

360. 23 O.J. EUR. COMM. (No. L 229) 30 (1980).

361. *Id.* art. 15.

362. 4 Common Mkt. Rptr. 11,649 (1985); *see also* 18 BULL. EC (7/8) 56 point 2.1.121 (Oct. 1985).

363. 23 O.J. EUR. COMM. (No. L 229) 30, art. 2(3) (1980).

364. *Id.* art. 3.

365. 28 O.J. EUR. COMM. (No. L 87) 1, art. 2 (1985).

366. *Id.* art. 3.

367. *Id.* art. 4.

368. 27 O.J. EUR. COMM. (No. L 188) 20 (1984).

369. *Id.* art. 3.

the national permitting authority is satisfied that:

> 1. all appropriate preventive measures against air pollution have been taken, including the application of the best available technology, provided that the application of such measures does not entail excessive costs;
> 2. the use of plant will not cause significant air pollution particularly from the emission of substances referred to in Annex II;
> 3. none of the emission limit values applicable will be exceeded;
> 4. all the air quality limit values applicable will be taken into account.[370]

The first two provisos merely require national authorities to impose reasonable conditions. The last condition emphasizes the preexisting requirements of the ambient air quality directives. The third is the potentially useful innovation. The emission limit values to which it refers are provided elsewhere in the directive. Specifically, the directive provides that the Council, acting unanimously on proposition of the Commission, may set not only measurement methods, but also emission limits for categories of industry.[371] Thus far, none have been established.

Establishment of these emission limitations will help overcome the inherent weakness of the ambient air quality directives in two ways. First, precise emission limitations will significantly restrict the practically unbounded discretion which member states currently enjoy in the translation of the general ambient air quality standards into emission limits for specific sources. Second, the emission limitations should compensate for the Commission's incapacity to intervene directly in member state administrative efforts. The emission limitations will be precise numerical limits. Either the limitations or the control technology which corresponds to them will be required in permits for new or modified installations. If a national permitting authority issues a permit without meeting these conditions, it will be violating Community law. It should therefore be conceivable for someone with standing, for example, a neighbor or an environmental group, to invoke the jurisdiction of the appropriate national court to invalidate a defective permit.

A proposed directive for large combustion plants, including fossil fuel electric power plants, large industrial boilers, and spaceheating plants, would adopt the approach of focusing on emission limitations

370. *Id.* art. 4.
371. *Id.* art. 8.

by sector.[372] Over a ten year period the directive would require member states to reduce emissions from these sources by 60% for sulfur dioxide, 40% for dust, and 40% for nitrogen oxides.[373] Member states are to devise plans to achieve these reductions.[374] In addition, national licenses would have to contain emission limitations specified by the directive for sulfur dioxide, dust, and nitrogen oxides.[375]

VII. CONCLUSION

In the United States, air pollution control became serious through the development of a federal bureaucracy capable of effectively requiring each state to either take action itself or be preempted by direct federal action. Prior efforts of a limited number of individual states, together with growing public consciousness of air pollution, triggered this development. The federally mandated state bureaucracies, although expressing a diversity of forms and retaining substantial autonomy, must satisfy federally imposed minimum standards of activity or be displaced by the federal bureaucracy. Under this system, far more has been accomplished than under the previous regime of federal inaction. The federal commitment to compel local action largely overcomes the political externality problems which tend to lead to local inertia with respect to air pollution control. Nonetheless, there continues to be meaningful exercise of state autonomy.

France's tradition of centralization dates at least from Napoleonic times. The centralization of its air pollution control efforts together with the technocratic approach characteristic of the French public administration led to neglect of the value of local autonomy. With the arrival of the socialists to power in 1981, local autonomy first became a legislatively approved policy, although it has yet to be extended to air pollution control.

The interest of examining the actual French policy of centralized air pollution control is twofold. First, it shows a real situation in which excessive centralization raises significant problems of political legitimacy. Second, despite the lack of local political autonomy, the relation between central bureaucrats and peripheral level bureaucrats of the central administration furnishes a further illustration of the

372. O.J. EUR. COMM. (No. C 258) 3 (1983).
373. *Id.* art. 3(2).
374. *Id.* art. 3(1).
375. *Id.* art. 4(1).

merit of a system whereby central authorities are capable of imposing strong minimum levels of action.

Italy is a regional state in which primary responsibility for air pollution control has been shifted to the regions without any serious central effort to ensure a minimum of uniformity or of regional activity. There is substantial dissatisfaction with the results obtained. Whether the new, statutorily granted powers of the Ministry of Environment to substitute itself for inactive local authorities will be effectively exercised remains to be seen. The possibilities of relying on European Community law to supply the central impetus lacking at the national level in Italy further demonstrate the value of federalism.

Federalism, centralism, and regionalism might seem to be experiences too diverse to yield meaningful comparative results. In fact, the comparison yields useful results.

The French and United States air pollution control policies provide for local administration, but leave the central level ample powers to fix minimum standards and to impel local action. The French policy, although effective, suffers from legitimacy problems because of the remoteness of local bureaucratic authorities from democratic control. In Italy, the central level has not had a real power to impel action by the regional bodies which directly administer air pollution control. However, the development of European Community norms combined with effective exercise of the Ministry of Environment's new powers of substitution and continued judicial intervention could compensate for the lack of national central direction.

From a policy perspective, the comparative investigation of decentralization has provided useful results for each system. The recommendation for the United States is to retain the basic structure of federal-state relations of its present policy. For France, it is to adapt the ongoing decentralization policy to air pollution control in a way that maintains the present advantages of central impulsion. For Italy, which is engaged in the first stages of a review of its air pollution legislation due to the prompting of Community legislation, the recommendation is to achieve a greater central capacity to require regional action. In the absence of this improvement, judicial activism and Community legislation may serve to help fill the gap.

Extending the analysis of local and central relations from the national level in the case of France and Italy to include the European Community introduces a new level of complexity. The supranationalism of the European Community is not comparable to the federalism

of the United States or the regionalism of Italy. The members of the Community remain sovereign states, and for the foreseeable future the Community will have no executive or administrative authority capable of supplanting national administrative and legislative actors who fail to implement Community policies. This is especially true for policies like the Community's environmental policy, the implementation of which may require extensive reform of national legislation and the development of new national bureaucratic structures.

Nonetheless, the very success of the European Community facilitates the ability of polluting activity to move across borders in the quest for pollution havens. Accordingly, the political externality considerations discussed with regard to the United States, France, and Italy also apply at the Community level. The Community's extensive environmental legislation is undoubtedly motivated in part by such considerations. The challenge facing the Community is to elaborate its policies in the ways most likely to compensate for the lack of Community executive and administrative ability. The recent openness to Community air pollution emission standards is probably a productive step in this direction.

There is no easy solution to the problem of air pollution, and the distribution of responsibility between central and local levels of government discussed here is only one of the many issues to be considered in developing an air pollution control program. Comparison of the United States, French, and Italian experiences does, however, show the significant effect which this distribution of responsibility has on the substance of control efforts. The comparison also illustrates the general importance of structural issues. Thus, this study of central and local responsibilities should prove of interest to those concerned with issues ranging from the merit of economic incentive approaches versus command and control regulation to the relative roles of the judiciary and the public administration.